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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

CONSOLIDATION COAL COMPANY, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT**

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency, petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals in *National Crushed Stone Association v. EPA* (App. A, *infra*, 1a-37a), is reported at 601 F.2d 111. The opinion of the court of appeals in *Consolidation Coal Company v. Costle* (App. C, *infra*, 40a-78a) is reported at 604 F.2d 239.

## JURISDICTION

The judgment of the court of appeals in *National Crushed Stone Association v. EPA* (App. B, *infra*, 38a-39a), was entered on June 18, 1979. The judgment in *Consolidation Coal Company v. Costle* (App. D, *infra*, 79a-80a), was entered on June 25, 1979. On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 16, 1979, and on October 11, 1979, he further extended the time to and including November 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether regulations adopted by the Administrator of the Environmental Protection Agency establishing effluent limitations on discharges of pollutants, based upon the application of "best practicable control technology currently available" pursuant to Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311 (b)(1), must include a variance provision that requires consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology.

2. Whether the validity of the Administrator's variance clause is subject to judicial review before its application to any discharger of pollutants.

## STATUTE INVOLVED

Pertinent portions of Sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, 1314(b) are set forth in Appendix E, *infra*, 81a-85a.

## STATEMENT

In these cases, the court of appeals held that, in acting on applications by dischargers of pollutants into the nation's waters for individual variances from the pollution limitations established by the Administrator of the Environmental Protection Agency under 33 U.S.C. 1311(b)(1)(A), the Administrator must consider the applicant's claim that it cannot afford to implement the pollution control technology necessary to comply with the limitations. The court rejected the Administrator's contention that, under the statute, an individual discharger's economic inability to comply with those limitations is not a ground for granting a variance. The statutory and procedural background of these decisions is as follows:

1. Concluding that "the Federal water pollution control program \* \* \* [had] been inadequate in every vital aspect,"<sup>1</sup> Congress enacted the Federal Water

<sup>1</sup> S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), reprinted in 2 *Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 32-1, at page 1425 (Comm. Print 1973) (hereafter *Leg. Hist.*). See, also, *EPA v. State Water Resources Control Board*, 426 U.S. 200, 202-203 (1976).



Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*, which substantially rewrote the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.*<sup>2</sup> In this Act, now commonly referred to as the Clean Water Act, Congress declared as a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," 33 U.S.C. 1251(a)(1). To achieve this goal, Section 301(a), 33 U.S.C. 1311(a), makes the discharge of any pollutant by any person unlawful, except where the discharge is in compliance with Section 301 itself and certain other enumerated sections of the Act, including Section 402, 33 U.S.C. 1342. In Section 301(b), 33 U.S.C. 1311(b), Congress directed the Administrator of EPA to establish maximum "effluent limitations" (*i.e.*, pollution limitations) on discharges from existing point sources.<sup>3</sup> In Section 402 of the Act, 33 U.S.C. 1342, Congress established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the

<sup>2</sup> The Act was most recently amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and by the Act of November 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Until the 1977 Amendments, this legislation was generally known as the "Federal Water Pollution Control Act."

<sup>3</sup> Although Section 301(b) states, in the passive, that "there shall be achieved [effluent limitations]," this Court in *duPont v. Train*, 430 U.S. 112, 126-130 (1977), construed that section as authorizing and directing the Administrator to promulgate effluent limitations by regulation.

The terms "effluent limitation," "discharge of pollutants," "pollutant" and "point source" are defined in Section 502 of the Act, 33 U.S.C. 1362.

effluent limitations. It is unlawful for any person to discharge pollutants into the nation's waters without an NPDES permit, and the permits incorporate the effluent limitations promulgated under Section 301(b). Thus, an NPDES permit under Section 402 "serves to transform generally applicable effluent limitations \* \* \* into the obligations (including a timetable for compliance) of the individual discharger \* \* \*." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See also *duPont v. Train*, 430 U.S. 112, 126 n.15 (1977).

Section 301(b) provides for the implementation of effluent limitations for existing point sources in two stages. First, Section 301(b)(1)(A) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1977, "requir[ing] the application of the best practical control technology currently available" (hereinafter referred to as "BPT" limitations). Second, Section 301(b)(2) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1987, requiring, depending on the type of pollutant, application of either the "best available technology economically achievable" or "best conventional pollutant control technology" (hereinafter, collectively referred to as "BAT" limitations). Section 301(b)(2)(A)-(E), 33 U.S.C. (Supp. I) 1311(b)(2)(A)-(E).<sup>4</sup>

<sup>4</sup> When this Court decided *duPont v. Train*, *supra*, the Act required BAT limitations to be achieved by 1983. The Court thus frequently referred to BAT limitations as the "1983 limitations." As amended in 1977, Section 301(b)(2) has deferred the best available technology deadline. For certain

The terms "best practicable," "best available," and "best conventional" technology are mainly defined in Section 304 of the Act, 33 U.S.C. 1314. Section 304 (b)(1)(B) provides that "[f]actors relating to the assessment of best practicable control technology \* \* \* shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved" as well as "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate."

Section 304(b)(2)(B) adopts the same factors in defining best available technology as those employed in defining best practicable technology with one exception. Unlike the provision dealing with best practicable technology, Section 304(b)(2)(B) does not require the Administrator to consider the total cost of the best available technology in relation to expected effluent reduction benefits. Section 301(c), however,

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toxic pollutants, best available technology must now be achieved by July 1, 1984. Section 301(b)(2)(C). For other pollutants, the deadline is between July 1, 1984, and July 1, 1987, depending upon when EPA establishes the limitations. Section 301(b)(2)(F). In the Clean Water Act of 1977, Congress added a new technology level to replace best available technology for so-called "conventional" pollutants. This level, which must be met by July 1, 1984, is called "best conventional pollutant control technology." Section 301(b)(2)(E). For purposes of this case, the distinction between best available and best conventional technologies is not pertinent.

provides that the Administrator may modify the BAT limitations as applied to particular dischargers if the discharger demonstrates that the modification "(1) will represent the maximum use of technology within [his] economic capability \* \* \* and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

In *duPont v. Train*, *supra*, 430 U.S. at 128, this Court upheld the authority of the Administrator to establish effluent limitations based on the best practicable technology—i.e., the 1977 limitations—so long as he permits some modification of those limitations with respect to individual plants through a variance clause. The Administrator has promulgated best practicable technology (or "BPT") limitations for 42 different industrial categories. See 40 C.F.R. Parts 405-460. With respect to each set of those limitations, the Administrator has promulgated a standard variance clause setting forth the grounds upon which the NPDES permit issuing authority (i.e., either EPA or state agencies with acceptable NPDES systems) may grant an individual discharger a modification of the effluent limitations.<sup>4a</sup> With respect to variances from the BPT limitations, the Administrator has concluded that the pertinent issuing agency may, under the statute, consider whether the individual discharger's cost of compliance with the limitations significantly exceeds the costs of other

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<sup>4a</sup> Under the statutory and regulatory system, state agencies with acceptable NPDES systems act in the first instance upon individual applications for variances, but EPA has the final authority with respect to the grant of such applications. See, e.g., 40 C.F.R. 432.22.

dischargers in the same industry. The variance clause, however, does not allow the permit issuing agency to consider, or grant, a variance based upon a claim that an individual discharger cannot afford best practicable technology.<sup>5</sup> As EPA has most recently stated (43 Fed. Reg. 50042 (1978) (emphasis in original)):

While EPA allows compliance costs to be considered under the BPT variance clause, it should be noted that EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific, economic cap-

<sup>5</sup> The standard best practicable technology variance clause, promulgated in these and other cases, provides (40 C.F.R. 434.22):

In establishing the [national best practicable technology] limitations \* \* \* EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the \* \* \* effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to [the permitting authority] that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. \* \* \* If such fundamentally different factors are found to exist, [the permitting authority] shall establish for the discharger effluent limitations \* \* \* either more or less stringent than the [national best practicable technology limitations] to the extent dictated by such fundamentally different factors.

ability or "affordability") applies only to best available technology (BAT) limitations.

Thus a plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be  $x$  times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation.

See also *In re Louisiana-Pacific Corp., etc.*, 10 E.R.C. 1841 (1977).

2. In April 1977, the Administrator adopted regulations establishing BPT limitations on discharges from existing point sources in certain subcategories of the coal mining industry, *i.e.*, coal preparation plants, acid mine drainage and alkaline mine drainage (42 Fed. Reg. 21380 *et seq.*, adopting 40 C.F.R. Part 434). In July 1977, the Administrator published regulations establishing BPT limitations on discharges from existing point sources in the crushed stone and construction sand and gravel subcategories of the mineral mining and processing category (42 Fed. Reg. 35843 *et seq.*, adopting 40 C.F.R. Part 436). Both regulations included EPA's standard variance provision for each subcategory.<sup>6</sup>

<sup>6</sup> 40 C.F.R. 434.22 (coal preparation plants); 40 C.F.R. 434.32 (acid mine drainage); 40 C.F.R. 434.42 (alkaline mine drainage); 40 C.F.R. 436.22 (crushed stone) and 40 C.F.R. 436.32 (construction sand and gravel).

Petitions to review both sets of regulations were filed in various courts of appeals under Section 509(b)(1)(E), 33 U.S.C. 1369(b)(1)(E), and all the petitions were ultimately transferred to the Fourth Circuit. The petitions challenged the regulations on various grounds, including the sufficiency of the variance clauses. The variance clauses were alleged to be inadequate, because they failed to provide for consideration of the economic ability of individual dischargers to afford the costs of best practicable technology.

In *National Crushed Stone Association v. EPA*, (App. A, *infra*, 1a-37a), the court of appeals vacated and remanded the substantive mineral mining regulations on various grounds (*id.* at 14a-29a), and we do not challenge that aspect of the court's decision. The court, however, also remanded the variance clauses promulgated in connection with those regulations on the ground that variance clauses pertaining to BPT limitations must include the same factors that Section 301(c) of the Act requires the agency to consider in acting on variance applications from the BAT limitations, which are to become effective no later than July 1, 1987 (*id.* at 29a-35a). Those Section 301(c) factors include a showing by the discharger that the requested variance "will represent the maximum use of technology within the economic capability of the [discharger] \* \* \*."

In remanding the variance clause, the court relied (*id.* at 29a-33a) on its earlier decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351, as modified, 545 F.2d 1380 (1976). In that case the court had remanded a similar variance clause pertaining to the steam electric power industry (see 39 Fed. Reg. 36186 *et seq.* (1974)), on the ground that "EPA should come forward with a meaningful variance clause applicable to existing as well as new sources, taking into consideration at least [the] statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)." 545 F.2d at 1359-1360 (footnote omitted). The court concluded (545 F.2d at 1359):

Clearly, the Act, in its regulatory plan, contemplates increasingly stringent control measures for existing and new sources culminating in the elimination of the discharge of all pollutants into navigable waters by 1985. We are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations, were not intended to be applied any less flexibly than the final Phase II-1983 [now 1987] requirements. Thus, if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.



In *Consolidation Coal Company v. Costle*, the court of appeals affirmed the substantive coal mining regulations (App. C, *infra*, 40a-78a). As in *National Crushed Stone*, however, it remanded the variance clauses "for revision to conform with *National Crushed Stone*" (*id.* at 50a-52a).

#### REASONS FOR GRANTING THE PETITION

The decisions below, remanding EPA's standard variance clause pertaining to BPT limitations, is in conflict with the decision of the District of Columbia Circuit in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (1978). Moreover the conflict involves an important issue that warrants this Court's review. Although the decisions below directly concern the variance clauses pertaining to effluent limitations for two industries, EPA has promulgated essentially the same variance clause in connection with all of its BPT limitations, applicable to 40 other industries. The decisions below thus create considerable doubt with respect to the validity and proper application of those clauses as well. Furthermore, whether EPA must allow variances to be granted on the basis of claims that individual dischargers cannot afford to comply with BPT limitations is a question that has significant implications for the achievement of Congress' objective of eliminating pollution from the nation's waters. We believe that the decisions below are incorrect, but in any event we submit that the

question is sufficiently important to merit this Court's review.

1. The decision below conflicts with *Weyerhaeuser Co. v. Costle*, *supra*. In that case, dischargers challenged EPA's standard variance clause as it pertained to BPT limitations established for the pulp and paper industry on the ground that it failed to permit consideration of individual dischargers' economic inability to comply with the limitations. The court rejected that contention. It noted that Section 301(c), which is the only statutory provision expressly dealing with variances, makes the economic capability of individual dischargers relevant only to applications for variances from the BAT limitations, which are the second phase of the statutory program. 590 F.2d at 1034-1035. The court also noted that Section 304(b)(1)(B), which sets forth the factors the Administrator must consider in establishing BPT limitations, requires the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved," but does not require the Administrator to consider the economic or financial ability of operators to meet those costs. 590 F.2d at 1035-1036. Finally, the court reviewed the legislative history of the Act and concluded that that history, as well as the language and structure of the statute, demonstrates that the economic hardships of individual operators are not proper grounds for excusing their compliance with

BPT limitations (*id.* at 1036-1037). Thus, the court stated (*id.* at 1036; emphasis in original):

We have explored this issue carefully, and we express our conclusion emphatically: Although the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); *so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.*

We reach this conclusion under the statute only after satisfying ourselves that the legislative intent is as clear as the result is harsh \* \* \*.

The decisions below, and in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1380 (4th Cir. 1976), on which they relied, are in direct conflict with that holding.<sup>7</sup>

<sup>7</sup> In *National Crushed Stone*, the court below expressed the incorrect view that "our construction of the variance provisions seems to be generally, if not precisely, in accord with that of the court in *Weyerhaeuser Co. v. Costle* [*supra*]" (App. A, *infra*, 34a). Although the court correctly noted that the court in *Weyerhaeuser* had held that "EPA's application of the 1977 [*i.e.*, BPT], variance clause must bear a similar relationship to the 1977 standards as the 1983 variance clause bears to the 1983 standards" (App. A, *infra*, 34a), it overlooked the critical holding of the District of Columbia

2. The issue is important. As we have noted, EPA has promulgated its standard variance clause in connection with BPT limitations for 42 industries. Under the decisions of the Fourth and District of Columbia Circuits, the agency's construction and application of that clause is invalid with respect to three industries, valid with respect to one, and in doubt with respect to 38 others. Such a result is unacceptable for the administration of an Act designed to establish nationally uniform requirements.

Furthermore, whether or not individual dischargers may obtain a variance from BPT limitations based on their own economic inability to comply is a question of substantial importance not only to those individual dischargers, whose economic survival may turn on the matter, but also to the achievement of Congress' purpose to eliminate water pollution. As the District of Columbia Circuit said in *Weyerhaeuser, supra*, 590 F.2d at 1036:

This issue is crucial, of course, because those mill operators who are most hard pressed economically will be the most likely to pursue vigorous variance demands. Moreover, when faced with the ultimate threat of economic hardship—plant closure, with attendant unemployment and regional economic dislocation—the local permit-granting agency will find it difficult to resist a plea for a variance.

Circuit that the BPT variance clause, in contrast to the BAT variance clause, need *not* require consideration of the individual discharger's economic inability to meet BPT limitations. The court below held to the contrary that it must.

The importance of the issue to the legislative objectives is also reflected in the remarks of Senator Nelson during the debates on the Act (2 Leg. Hist. 1355):

\* \* \* [T]he approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless.

3. We submit that the decisions below are wrong for the reasons stated by the District of Columbia Circuit in *Weyerhaeuser, supra*. This, as the court correctly concluded, the language and structure of the Act support the Administrator's conclusion that, unlike variances from BAT limitations (which are expressly governed by Section 301(c)), BPT limitations and variances from them are not to be based on the economic inability of individual dischargers to apply the "best practicable control technology."

Furthermore, the District of Columbia Circuit correctly found that the legislative history demonstrates that Congress deliberately adopted "best practicable control technology" as a minimal level of effluent control that *all* sources within a category or class had to meet, even if the cost of compliance could drive certain individual sources out of business. For example: the conference committee report on the Act,

in a passage quoted in part in *duPont v. Train, supra*, 430 U.S. at 129, stated (1 Leg. Hist. 304):

The conferees intend that the Administrator \* \* \* will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable. \* \* \*

Similarly, Senator Muskie, "perhaps the Act's primary author," \* explained the "cost-benefit" language in Section 304(b)(1)(B) as follows (1 Leg. Hist. 170; emphasis supplied):

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, *and to avoid imposing on the Administrator any requirement \* \* \* to determine the economic impact of controls on any individual plant in a single community.*

It is assumed, in any event, that "best practicable technology" will be the minimal level of control imposed on all sources within a category or class \* \* \*.

Representative Jones of Alabama, chairman of the House conferees, in presenting the conference bill to

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<sup>8</sup> *duPont v. Train, supra*, 430 U.S. at 129.

the members of the House, also stated (1 Leg. Hist. 231, 232; emphasis supplied) :

If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge [permit] issued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.*

\* \* \*

\* \* \* [S]ection 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirement proposed by the owner or operator.

\* \* \*

*This provision is not intended to justify modifications which would not represent an up-grading over the July 1, 1977, requirements of "best practicable control technology."*

See also remarks of Senator Nelson, quoted *supra*, page 16 (2 Leg. Hist. 1355).

Neither the decisions below nor *Appalachian Power Company, supra*, on which they relied, discussed the legislative history of the Act. Instead, they were based on the court's view that it would be illogical for an agency not to consider a factor (economic inability) in acting on an application for a variance from BPT limitations when it will consider the same factor in acting upon variances from the more stringent BAT standards (see App. A, *infra*, 34a; *Appalachian Power Co., supra*, 545 F.2d at 1359). Even as a matter of abstract logic, however, there is

no inconsistency in concluding that a more stringent standard should be accompanied by a more liberal variance provision in order to prevent the greater economic dislocations that might otherwise result. Furthermore, the court's logic overlooks the fact that under the statutory scheme, BPT levels are intended as a minimum requirement that no discharger will be permitted to violate, even after 1987, regardless of his economic situation.<sup>9</sup> In any case, the matter ought not be judged abstractly. As this Court stated in *duPont v. Train, supra*, 430 U.S. at 138, in rejecting the Fourth Circuit's application of similar logic to a closely analogous issue under the Clean Water Act: "The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations."<sup>10</sup>

<sup>9</sup> Thus, Section 301(c), which deals expressly with variances from BAT limitations requires a discharger applying for a variance to demonstrate not only that the requested modifications will reflect the "maximum use of technology within [his] economic capability" but also "will result in reasonable further progress toward the elimination of the discharge of pollutants." If an applicant for a variance from BAT limitations were to seek a modification that would allow greater discharges than even the BPT limitations would have allowed, his proposed modification would not "result in reasonable further progress toward the elimination of the discharge of pollutants."

<sup>10</sup> In *duPont v. Train*, the Fourth Circuit held that the Administrator should promulgate a variance clause with respect to the most stringent "new source" limitations established under Section 306 of the Act, 33 U.S.C. 1316, on the ground that "provisions for variances, modifications, and



4. This case also presents a substantial ripeness question. In *duPont v. Train, supra*, this Court upheld the Administrator's authority to promulgate BPT limitations by regulation "so long as some allowance is made for variations in individual plants." 430 U.S. at 128. The Court, however, agreed with the court of appeals in that case that "consideration of whether EPA's variance provision has the proper scope would be premature" (*id.* at 128 n.19), in view of the fact that that case did not involve the application of the variance clause to any particular discharger.

Similarly, the variance clauses reviewed and remanded by the court of appeals in these cases have not yet been applied to any applicant for a variance. For that reason we argued in the court of appeals that such pre-enforcement review of the validity of those clauses would be inappropriate under the principles announced in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and other cases. The court disagreed. It concluded that the Administrator had made clear, in a number of statements and decisions since *duPont v. Train*, that economic inability would not be a ground for granting variances, and that those statements made the issue sufficiently ripe for review (App. A, *infra*, 30a-32a). In *Weyerhaeuser, supra*, the District of Columbia Circuit also reviewed

exceptions are appropriate to the regulatory process." *duPont v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976). This Court rejected that view on the ground that it was contrary to the statute. 430 U.S. at 138.

EPA's standard variance clause and upheld the Administrator's position.<sup>11</sup>

We continue to believe that it was inappropriate for the court to review the variance clause prior to its application to any individual discharger. We acknowledge, however, that the question is a close one, because the Administrator's position on the variance clause has now become clear and presents a discrete legal issue that is capable of pre-enforcement review. See *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 149-153. Moreover, there is a direct conflict between the decision below and the District of Columbia Circuit on that issue that needs to be resolved.

Standing alone, the ripeness question might not warrant this Court's review. The difficulty faced by the agency, however, is that if the Court denies review of the decisions below, the agency is required by the court of appeals' judgment to amend its variance clauses pertaining to these two industries to conform to the court's decision. The agency would thus never have an opportunity to present its position for this Court's review in any subsequent proceeding involving actions on variances in these industries; and in view of the conflict among the circuits, it would have

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<sup>11</sup> In *Weyerhaeuser*, the court purported not to undertake "final review of the variance provision," but rather to engage in a "threshold review" to determine whether the provision was sufficiently flexible to satisfy this Court's statement in *duPont* that "some allowance" must be made for variations in individual plants. 590 F.2d at 1032. Whatever label the court applied, it did in fact review the variance clause and upheld the Administrator's position as a matter of law.

to continue to apply different standards to different industries.

Accordingly, if this Court agrees with us that the issue is not ripe for review, we believe it should grant the petition and vacate the judgments below on that ground, so that the issue may be preserved for later cases in which it is ripe for review. If the court disagrees with us on the ripeness question, it should grant the petition and review the question we have presented on the merits.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1979

### APPENDIX A

#### UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 76-1914

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NATIONAL CRUSHED STONE ASSOCIATION, INC.  
and LUCK QUARRIES, INC., PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-1929

---

WARREN BROTHERS COMPANY, a Division of  
Ashland Oil Co., Inc., and Ashland Oil, Inc.,  
PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

---

No. 76-1930

---

ARKHOLA SAND AND GRAVEL COMPANY, a Wholly  
Owned Subsidiary of Ashland Oil, Inc.,  
PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

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Argued April 4, 1978

Decided June 18, 1979

Before HAYNSWORTH, Chief Judge, RUSSELL and  
WIDENER, Circuit Judges

WIDENER, Circuit Judge:

Petitioners, National Crushed Stone Association (NCSA), Warren Brothers Company (Warren Brothers), and Arkhola Sand and Gravel Company (Arkhola) seek review of certain regulations promulgated by the Environmental Protection Agency (EPA) pursuant to §§ 301, 304 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1311, 1314. These regulations establish limitations on the discharge of pollutants<sup>1</sup> from existing point sources<sup>2</sup> of the crushed stone and construction sand and gravel subcategories of the mineral mining and processing point source category, based upon the best practicable

<sup>1</sup> "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." FWPCA § 502(6); 33 U.S.C. § 1362(6).

<sup>2</sup> "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." FWPCA, § 502(14); 33 U.S.C. § 1362(14).

control technology currently available (BPT).<sup>3</sup> The regulations challenged here were promulgated in final form on July 12, 1977, to be effective August 11, 1977, 42 F.R. 35843 et seq. Previous to the promulgation of the final regulations, the EPA had issued regulations in "interim final" form,<sup>4</sup> June 10, 1976, 41 F.R. 23552 et seq. This court has jurisdiction under § 509 (b) (1) of the FWPCA, 33 U.S.C. 1369(b) (1).

The crushed stone subcategory regulations, 42 F.R. 35849-50, to be codified as a part of 40 C.F.R. Part 436, subpart B, apply "to the mining or quarrying and the processing of crushed and broken stone and riprap. This subpart includes all types of rock and stone." 42 F.R. 35849. Riprap consists of large, irregular stones used chiefly in highway embankments and in river and harbor work. Other types of crushed stone are used, for example in concrete, macadam, and bituminous aggregate, in railroad ballast, in agriculture, and in road bases. Approximately three quarters of all crushed stone is limestone. The crushed-stone industry is widespread, with all States reporting some production. The size of individual

<sup>3</sup> FWPCA, §§ 301(b) (1) (A) (i), 304(b) (1) (A); 33 U.S.C. § 1311(b) (1) (A) (i), 1314(b) (1) (A).

<sup>4</sup> The EPA failed to meet the deadline established by the FWPCA, § 304(b); 33 U.S.C. § 1314(b), for establishing guideline regulations. The interim regulations were promulgated by EPA in response to a court order which required the EPA to issue the regulations according to a timetable. 41 F.R. 23552, citing *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), affirmed in part, reversed in part, 510 F.2d 692 (D.C. Cir. 1975).

facilities varies widely, from less than 25,000 to 15 million tons per year. Facilities which produce less than 25,000 tons per years constitute one-third of the total number of facilities, but only 1.3% of total national output. At the other extreme, 5.2% of the facilities each produce more than 900,000 tons annually, but together these make up 39.5% of the total output. Nationwide there are approximately 4800 crushed stone facilities.

The construction sand and gravel subcategory regulations, 42 F.R. 35850-51, to be codified as 40 C.F.R., Part 436, subpart C, apply "to the mining and the processing of sand and gravel for construction or fill uses." 42 F.R. 35850, § 436.30. Construction sand and gravel is used in building, paving, fill and railroad ballast applications. As with crushed stone, sand and gravel facilities are found in all States. Of the more than 5,000 firms engaged in production, 40% have an annual capacity of less than 25,000 tons; these smaller firms account for 4% of the national output. Larger firms with an annual capacity of more than one million tons, on the other hand, account for 12-15% of the national output, although by number they constitute less than 1% of the producing facilities.

Crushed stone and construction sand and gravel operations produce two basic types of waste water which must be discharged and which the EPA has regulated. The first with which the Agency is concerned is that from "mine dewatering." For crushed stone operations the term means "any water that is impounded or that collects in the mine and is pumped,

drained or otherwise removed from the mine through the efforts of the mine operator." 42 F.R. 35849, § 426.21(b). The definition for the construction sand and gravel industry includes identical language. 42 F.R. 35850, § 436.31(b). The introduction of pollutants includes those coming from "surface runoff of rain water into the mine and mine water treatment systems, ground water seepage and infiltration into the mine." 42 F.R. 35845. The quantity of mine water that must be discharged either has no correlation with production or is only indirectly related. Only 13% of crushed stone facilities have no mine water. Mine water is also present in construction sand and gravel operations.

The other type of waste water commonly associated with crushed stone and construction sand and gravel operations is that used in the processing of the applicable products. In the crushed stone industry, after the stone has been extracted from the quarry and crushed and screened to meet size specifications, water is added to wash the stone. In a few operations the rough product is processed in a flotation cell, where impurities are removed in the overflow from the cell, and the product is removed in the underflow. Some facilities also have a dry production process. With the dry process, of course, there is no discharge of process generated waste water, although half of the dry process quarries must be dewatered on at least an intermittent basis. Overall in the crushed stone industry 59% of the 4800 facilities wash their product. Of the crushed stone wet processing facilities con-



tacted by the EPA, 33% do not discharge their wash water.

Construction sand and gravel facilities also use water in processing the product to remove impurities such as clay and silt in separating and classifying the product, and in cooling and dust suppression. Half (35) of the facilities visited by the EPA have no discharge of process water because they recirculate all process water. A few facilities achieved no discharge of process water because of soil percolation or because of dredging closed ponds, the process water being discharged back into the pond. Some sand and gravel facilities use a dry process, and thus have no discharge of process water. 4250 industry plants have wet process operations; only about 750 have dry operations. A few sand and gravel operations use dredging techniques.<sup>3</sup>

In developing the regulations the EPA considered the varieties, prevalence, and environmental effects of effluent produced by crushed stone and construction sand and gravel operations, and also the current pollution control practices used in the industries. Only two measures of pollution were considered by the Agency to be of sufficient importance to warrant regulation: Total suspended solids (TSS) and pH.<sup>4</sup> TSS

<sup>3</sup> The production of dredged sand and gravel which is processed on-board the dredging vessel is not covered by the regulations under review. 42 F.R. 35850, § 436.30.

<sup>4</sup> pH is a symbol expressing the acidity or alkalinity of a substance. A pH of 7 is neutral, with lower figures representing increasing acidity and higher figures representing increasing alkalinity.

measures both organic and inorganic materials, such as sand, silt, clay, grease, oil, and tar. Solids in suspension interfere with many industrial processes; they are aesthetically displeasing; they burden aquatic life by depleting the oxygen content of water and clogging the respiratory passages of various fauna. The Agency considers TSS to be the single most important pollutant parameter in the mineral mining and processing industry. The petitioners do not challenge the EPA's regulation of pollution as measured by pH.<sup>7</sup>

The interim regulations published by the EPA on June 10, 1976, 41 F.R. 23552, divided waste water discharges from crushed stone and construction sand and gravel facilities into two components. "Mine dewatering," referred to earlier, was there defined for both subcategories as "any water that is pumped, drained or otherwise removed from the mine through the direct action of the mine operator." 41 F.R. 23558, § 436.21(b); 42 F.R. 23559, § 436.31(b). The definition for construction sand and gravel added "wet pit overflows," not relevant here. Mine water was permitted to be discharged if TSS concentration did not exceed 30 milligrams per liter (mg/l) of waste water output for any one day. 51 F.R. 23558, § 436.22(a)(2), 41 F.R. 23559, § 436.32(a)(2). The technical material accompanying the crushed stone regulations, 41 F.R. 23554, explained in general that

<sup>7</sup> In their opening brief, petitioners note that "only the provisions relating to the TSS requirements are relevant here."

"mine dewatering for all subcategories is limited on a daily maximum basis only, since mine dewatering may occur on an intermittent basis." Water which collects on quarry floors "is quite clear" and "is typically of excellent purity," 41 F.R. 23554. Thus, it often may be discharged without treatment, but "in extreme cases [where treatment is necessary] a settling pond at ground level" will permit enough of the suspended solids to settle out so that the mine water will meet the 30 mg/l criterion. 41 F.R. 23555.

The other waste water discharge regulated by the Agency in the interim regulations was "process generated waste water," defined for crushed stone operations as "any waste water resulting from the slurry transport of ore or intermediate product, air emissions control, or processing exclusive of mining." 41 F.R. 23558, § 436.21(e). No discharge of process generated waste water pollutants was permitted by the interim regulations, *Id.* at § 436.22(a)(1), although the regulations contained exceptions.<sup>8</sup> Crushed stone facilities would be able to meet the no discharge requirement by clarifying process generated waste water in a settling pond, and then recirculating it in the production cycle. 41 F.R. 23554. As envisioned by EPA in the interim regulations, all water used in the production processes would be recycled back

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<sup>8</sup> The regulations did permit discharge of process water when an overflow occurred as a result of a "maximum 24 hour precipitation event with a probable reoccurrence interval of once in 10 years." 41 F.R. 23558, §§ 436.21(c), 436.22(b).

to the process for reuse, and thus there would be no discharge.

The regulatory scheme established by the interim regulations for construction sand and gravel plants was not identical, but similar. There, too, discharge of process generated waste waters was prohibited. 41 F.R. 23559, § 436.32(a)(1). However, because the EPA found that in construction sand and gravel plants "mine water is often treated in process waste water ponds," 41 F.R. 23555, the interim regulations for construction sand and gravel operations provided that when "waste streams from various sources are combined for treatment and discharge, the quantity and quality of each pollutant or pollutant property in the combined discharge shall not exceed the quantity and quality of each pollutant or pollutant property allowed had each stream been treated separately." 41 F.R. 23559, § 436.32(a)(3). Thus the regulations provided that the water to be discharged from the two sources could be commingled in the same settling pond and discharged subject to the 30 mg/l limit. The regulations did not require or mention recycling, and obviously rejected the Technical Summary, which in 41 F.R. 23555 had recommended recycling where there was a commingling in a settling pond.

On July 12, 1977, a little more than a year after the interim regulations were published, the EPA announced its final rulemaking for the crushed stone and construction sand and gravel subcategories, 42 F.R. 35843. Two principal changes which concern us were made in the final regulations. First, the maximum TSS mine water effluent limitation for both

subcategories was raised from a permissible discharge of 30 mg/l for any one day to 45 mg/l, but a new thirty day average of 25 mg/l was promulgated. 42 F.R. 35850, § 436.22(a)(1); 42 F.R. 35851, § 436.32(a)(1). Second, the no process water discharge provision of the interim regulations was changed for some facilities. Instead of the former provision, crushed stone and construction sand and gravel operations "that recycle waste water for use in processing" were permitted to discharge "process generated waste water pollutants" in accordance with a daily maximum of 45 mg/l and 30 day average of 25 mg/l. 42 F.R. 35850, § 436.22(a)(1), 42 F.R. 35851, § 436.32(a)(1). The interim no discharge provision was retained unchanged for facilities which did not recycle. 42 F.R. 35850, § 436.22(a)(2); 42 F.R. 35851, § 436.32(a)(2). In addition to these changes, the definition of mine water for both subcategories was changed by classifying all water collected or impounded in a mine as "process generated waste water" if the mine is used for treatment of "process generated waste water,"<sup>9</sup> and the definition of process

<sup>9</sup> The final definition of mine water for the crushed stone subcategory reads as follows:

(b) The term "mine dewatering" shall mean any water that is impounded or that collects in the mine and is pumped, drained or otherwise removed from the mine through the efforts of the mine operator. However, if a mine is also used for treatment of process generated waste water, discharges of commingled water from the facilities shall be deemed discharges of process generated waste water.

42 F.R. 35849, § 436.21(b). With the addition of one sentence, "This term shall also include wet pit overflows caused

generated waste water was amended to "include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water."<sup>10</sup>

In the Summary of Major Changes that accompanied the new regulations, the EPA explained the rationale for the changes described above. The increase in the daily maximum TSS discharge and the addition of a maximum average 30 day discharge "were made because additional data collected since the promulgation of the interim final regulations indicated that the day-to-day variations in discharges from individual operations were greater than initially found, and because the additional information collected provided the broader data base necessary for

solely by direct rainfall and ground water seepage," the definition of mine water for construction sand and gravel is identical. 42 F.R. 35850, § 436.31(b).

<sup>10</sup> The final definition of process generated waste water for the crushed stone subcategory reads as follows:

(e) The term "process generated waste water" shall mean any waste water used in the slurry transport of mined material, air emissions control, or processing exclusive of mining. The term shall also include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water.

42 F.R. 35849, § 436.21(e). With the addition of one sentence, "The term does not include waste water used for the suction dredging of deposits in a body of water and returned directly to the body of waste without being used for other purposes or combined with other waste water," the definition of process generated waste water for construction sand and gravel is identical. 42 F.R. 35850, § 436.31(e).

formulating a monthly average limitation." 42 F.R. 35844. The provision permitting discharge of process water for crushed stone and construction sand and gravel facilities that recycle was added when the EPA found that "a number of the facilities which currently recycle experience occasional discharges due to natural occurrences, such as rainfall or seepage." The discharge provision thus was added "to allow a limited discharge of process generated waste water pollutants." 42 F.R. 35844. Non-recycling facilities were not provided the benefits of the "limited discharge, however, because of the Agency's view that the best practicable control technology currently available for these industries includes recycling of process water." 42 F.R. 35844.

Petitioners challenge here the validity of the definition of process generated waste water contained in § 436.21(e) for crushed stone and § 436.31(e) for construction sand and gravel; the TSS limits for process generated waste water and the recycling requirement, § 436.22(a)(1) (crushed stone), § 436.32(a)(1) (construction sand and gravel); the no discharge provision for non-recycling operations, § 436.22(a)(2) (crushed stone), § 436.32(a)(2) (construction sand and gravel), and the TSS limits for mine dewatering discharges, § 436.22(a)(3) (crushed stone), § 436.32(a)(3) (construction sand and gravel). In addition, petitioners ask that the variance provisions for the crushed stone (§ 436.22) and construction sand and gravel (§ 436.32) subcategories be set aside as inconsistent with our de-

cision in *Appalachian Power Co. v. Train*, 545 F2d 1351 (4th Cir. 1976).

The standards which we must apply to the review of EPA regulations have been set out elsewhere and need not extensively be reviewed here. E.g., *Appalachian Power*, *supra*, 545 F2d at 1356-57; *duPont v. Train*, 541 F2d 1018, 1026 (4th Cir. 1976), *aff'd* in part and *rev'd* in part on other grounds, 430 U.S. 112 (1977); *Tanners' Council of America, Inc. v. Train*, 540 F2d 1188, 1191 (4th Cir. 1976). Briefly, under the Administrative Procedure Act, 5 U.S.C. § 706(2), we may not set aside the regulations unless we find their promulgation to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," § 706(2)(A), or "without observance of procedure required by law," § 706(2)(d). In reviewing these regulations, we are further constrained by "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4307 (1978), and by provisions for rule making under the Administrative Procedure Act, 5 U.S.C. § 553, which establish "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rule making procedures." *Id.* at 4302 (footnote omitted). However, the Agency, as noted, must act in accordance with law, and not in an arbitrary or capricious manner. Neither may it abuse its discretion. 5 U.S.C. § 706. Courts are no longer



satisfied with bare administrative *ipse dixits*, and the Agency must make reasoned decisions with full articulation of the reasoning and take into account all relevant factors. *Appalachian Power Company v. EPA*, 477 F2d 495 (4th Cir. 1973).

### *TSS Effluent Limitations*

We first consider the claim of petitioners that the regulations (42 F.R. 35850-1, §§ 436.22(a)(1), 436.22(a)(3), 436.(a)(1), 436.32(a)(3)) establishing TSS limitations for mine dewatering and process generated waste water are invalid. The EPA has admitted that certain data called the "Versar data" were used to determine the 30 day TSS average of 25 mg/1 for both crushed stone and construction sand and gravel operations, and also has admitted the Versar data were used to determine the TSS daily maximum of 45 mg/1. So, unless the use of the data is harmless, regulations based upon it must be set aside if EPA's use of the data was not in accordance with law. We think the regulations are invalid for the reasons which follow.

The June 10, 1976 "interim final regulations," although effective immediately, provided for a public comment period extending until August 9, 1976, 41 F.R. 23553, and NCSA was afforded an additional period in which to comment. NCSA took advantage of this opportunity by filing written comments with EPA. After the close of the comment period and a public hearing held on December 2, 1976, however, on December 14-16, 1976 EPA's contractor, Versar,

Inc., visited EPA's regional headquarters in Atlanta and Dallas and obtained NPDES discharge monitoring reports for various crushed stone operations. This survey, referred to as the Versar data, was completed on February 25, 1977, and on March 15, 1977 the EPA met with some representatives of the crushed stone industry, including NCSA, at which meeting the Versar data were mentioned in the conversation. This was not a public meeting or hearing but was nothing more than a conference held at the request of some members of the industry affected. Petitioners have provided affidavits from participants at the March 15th meeting which show that while the data were discussed at this meeting, they were not made available to the industry for study and analysis. In addition, although industry representatives at the meeting on March 15th requested that they be afforded access to the Versar data, the EPA refused to make the data available until after promulgation of the final regulations. EPA has not filed counter affidavits but has related in its brief that "NCSA was shown the discharge monitoring data compiling the 'Versar data' ". Thus, we are confronted with a fact situation on all fours with that considered by this court in *Appalachian Power Co. v. EPA*, No. 72-1733, — F2d — (4th Cir. June 13, 1978). There, we held that upon an affidavit presented by EPA, petitioners not offering any, in the absence of counter affidavits we would be "unwilling to conclude that the statements in the affidavits are false." Slip op. at 15, n. 15. The same result should obtain here, and we

thus accept as correct the statements in petitioners' affidavits that they were not afforded an opportunity to examine, analyze, and comment on the Versar data. The various internal memoranda relied upon by EPA do not contradict the affidavits.

The fact situation so presented to us is very nearly the same as that presented in *Portland Cement Assoc. v. Ruckelshaus*, 486 F2d 375 (D.C. Cir. 1973), in which case the court set aside certain EPA regulations. Prior to the promulgation of the regulations there set aside, the court had remanded to EPA previous regulations because test information upon which the previous regulations had been based was refuted by an engineer experienced in the subject. On remand, instead of commenting on the conclusions of the engineer upon which the remand was based, EPA merely added that analysis to the record. The court set aside the regulations, finding that the comment offered by the industry affidavits was of possible significance in the results of the test. In its discussion of the case, the court said that it found "... a critical defect in the decision making process in arriving at the standard under review in the initial inability of the petitioners to obtain—in timely fashion—the test results and procedures used in existing plants which formed a partial basis for the emission control level adopted, and in the subsequent seeming refusal of the agency to respond to what seem[s] to be legitimate problems with the methodology of those tests." p. 392. The court also stated that "it is not consonant with the purpose of a rule making pro-

ceeding to promulgate rules on the basis of inadequate data or on data that [to] critical degree is known only to the agency." While the second rule just stated was apparently applied by that court in its initial remand proceeding, it is applicable here. EPA admittedly has relied on the Versar data in promulgating the TSS regulations at issue. At the time the regulations were being formulated, only EPA knew about the data in detail. Our case and *Portland Cement* are no different in that respect. The first rule above mentioned also is applicable to this case. Although the petitioners, or some of them at least, were at the meeting on March 15th, the refusal of the agency to make the actual data available to those immediately affected by it cannot be excused. The comments of the industry following the promulgation of the interim final regulations and at the December hearing could not have anticipated use of the Versar data because the same had not even been collected by Versar at that time.

We need not, however, place sole reliance on *Portland Cement* in deciding to remand. We have held in *duPont v. Train*, 451 F2d 1018 (4th Cir. 1976), and *Appalachian Power Co.*, 477 F2d 495 (4th Cir. 1973), that an agency engaged in rule making must "explicate fully its course of inquiry, its analysis and its reasoning." 541 F2d at 1026, 477 F2d at 507. In the case before us, EPA candidly admits that "the development document does not discuss the calculation process by which the agency arrived at the monthly average limit." That amounts to no less than an

admission that the regulation is invalid unless something else appears to render the omission harmless. While EPA, in its brief, does attempt to justify "the path of the administrator's reasoning," it has shown us no reason not to apply our holding in *duPont* that "after the fact rationalization by counsel in brief and argument does not cure non-compliance by the Agency with the stated principles." 541 F2d at 1026. See also *Portland Cement* at p. 395.

The justification offered by EPA in its brief for its failure to give the reasoning behind the new TSS standards is that the 25 mg/1 daily limit was a monthly average from the Versar data, and that the 45 mg/1 daily maximum was an increase sought by industry. The last of the reasons given by EPA is insufficient on its face, for the comments by industry seeking a higher daily maximum discharge limit were in the context of the interim final regulations which had rejected an average discharge limit in favor of a limit for each day. What industry sought was a higher limit for each day, which in fact was effectively lowered on a monthly basis by the new regulation.

More importantly, however, the petitioners never had a chance to respond to the Versar data before the promulgation of the final regulations. This is not consistent with the requirements of law. See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974), and *Granite City Steel Co. v. EPA*, 501 F2d 925 (7th Cir. 1974).

EPA argues that in all events the use of the Versar

data, however, is harmless because the increase in the maximum limit for any one day from 30 to 45 mg/1 more than compensates for the imposition of a monthly maximum average of 25 mg/1, so that, in fact, EPA increased the discharge limits rather than decreased them. The industry contests this conclusion, and EPA calls our attention to no data to corroborate its position.

Following the promulgation of the final regulations, the petitioners did very much the same as the petitioners in *Portland Cement*. They secured a report by an engineer who was an expert in the field, who took serious issue with the Versar data base on more than one ground. In his opinion the data were insufficient upon which to base the new regulations in many respects, among them; from a practical operating standpoint, the final regulations are more restrictive than the interim final regulations; EPA did not consider the technical feasibility or economic impact of the increase in settling pond size caused by discharging at 25 mg/1 rather than 30 mg/1; seventy-five percent of the permits surveyed were in three States, and over 50 percent in two States, although the industry is scattered nationwide and conditions differ widely; the types of rock mined in the quarries from which the Versar data came was not typical of all of the industry, especially the settling characteristics of the rock from which the Versar data came might well be different from rock in other parts of the country, and as well the settling characteristics in different climates are different; the Versar memorandum does not state the adequacy of

its data for statistical analysis; the TSS limitations were arbitrarily selected without benefit of a statistical basis. The objections go on and on, but enough have been related to show that they are far from frivolous, and while EPA will undoubtedly take issue with the report of the engineer, we need not, and do not, decide whether the objections raised in the engineer's report are valid. What we do decide is that the mistakes in the use of the Versar data, if any mistakes there were, were shown by the report to be of possible significance in the formulation of the final regulations. *Portland Cement* at p. 394. The engineer's report we have referred to raises significant questions as to the statistical validity of the Versar data, as well as to whether or not the data from that limited base could reliably be used in formulating national regulations. The fact that the petitioners, and just as importantly the fact that the public, had no opportunity to comment on the use of the Versar data prior to the promulgation of the final regulations in the face of serious questions concerning the validity of their use is reason to remand the regulations for further consideration.<sup>11</sup> When this is coupled with

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<sup>11</sup> We have not discussed the defects in procedure wholly on the basis of public or private right, for they are intertwined in this case. The Agency's own regulations provide that it shall make available "continuing policy, program, and technical information at the earliest practicable times and at places easily accessible to interested or affected persons and organizations so that they can make informed and instructive contributions to governmental decision making." 40 C.F.R. § 105.4(a). The regulations also provide that "conferring

the fact that the Agency admits that it did not explain the reasons for its actions, the obvious question arises as to whether or not they could have been justified in the record before the Agency.

We remand the TSS limitations to the Agency for reconsideration.<sup>12</sup>

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with the public after a final Agency decision has been made will not meet the requirements of this part," and by that "part" the regulations refer to "active public involvement in and scrutiny of the inter-departmental decision making process." 40 C.F.R. § 105.2. EPA did not make available the Versar data at any time, much less the earliest practicable time. Neither did the public nor the petitioners have a chance to comment on it until after the final Agency decision. A good discussion of the subject is found in Wright, *The Courts and the Rule Making Process: The Limits of Judicial Review*, 59 Cornell IR 375 (1974). In this respect, because we have set aside the regulations complained of on other grounds, we need not consider the use of a certain summary supplied by way of comment by the National Limestone Institute which EPA admittedly used in promulgating the final regulations. There is a dispute over whether or not the National Limestone Institute survey was available to the petitioners.

However, there seems to be no dispute that it was not available to the public, or at least there was no notice to the public that it was being relied upon.

<sup>12</sup> The EPA has confessed error in its brief for its failure to provide petitioners Warren Brothers and Arkhola Sand and Gravel with an opportunity to comment upon the Versar data used by the Agency in setting the monthly TSS average for construction sand and gravel plants. EPA brief at 18, n. 15. Since the Agency admits the Versar data also were used in setting the 45 mg/1 daily maximum, we do not think the EPA's confession of error should be confined to the 30 day average. In addition, we note that Warren Brothers had precisely made clear to the EPA its concern with the crushed stone as well as the sand and gravel limitations. As a result,



### *Recycling Provisions*

The next point which we consider is the contention that the recycling provisions (42 F.R. 35850-1, §§ 436.22(a)(1), 436.32(a)(1)) of the final regulations are invalid. Recycling was not mentioned in any way in the interim final regulations, and there was no requirement in them to recycle. The word simply does not appear. It is true that in the technical summary accompanying the interim final regulations in connection with zero discharge for process generated waste water that recycling was mentioned as an available technology. Also, for construction sand and gravel facilities, recycling was apparently contemplated as a requirement for discharge of process generated waste water when commingled with mine water. Recycling was also referred to as a treatment technology in the economic analysis. But the recycling technology for construction sand and gravel facilities was specifically rejected for the interim final regulations in that the technical summary provided that "treatment other than single settling ponds followed by recycling may be the only economically viable technology." With the technical summary which is at least confusing, the interim final regulations themselves specifically provided, for construction sand and gravel facilities, that process generated waste water, when commingled with other waste water, could be

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EPA's confession of error should be extended to the daily maximum and monthly average TSS limitation in both the crushed stone and sand and gravel subcategories. We consider this an alternate reason for setting aside the regulations.

discharged without recycling providing the numbered effluent limitations were met. The case was not quite the same in the interim final regulations for the crushed stone facilities. The interim final regulations contemplated that process generated waste water be kept separate from other waste water, and while providing a zero discharge limit for process generated waste water, allowed discharge of mine dewatering water providing the numbered effluent limitations were met.

Comments from the industry on the no discharge provision for process generated waste water, as EPA acknowledges, sought to provide for the crushed stone industry the same right to discharge the commingled waters that EPA had allowed the construction sand and gravel industry in the interim final regulations without recycling.

With this background, the final regulations were promulgated. Petitioners make a multitude of objections to them, of which we will discuss only a few.

First, the term recycle is not defined in the regulations. This may seem somewhat remarkable because the recycling requirement is acknowledged to be a major change between the interim final and the final regulations. This aside, nowhere in the regulations can it be found what part or what volume of the process generated waste water must be recycled to get the benefit of the discharge provisions. If petitioners claim, as EPA claims that they do, that total recycling is required, that term is not defined. If the requirement is partial recycling as EPA claims,

then that term is not defined. There simply is no definition.<sup>13</sup> EPA claims in its brief that the answer is apparent, that "all the water used in the industrial process must be obtained from the treatment system itself." But then it adds that "excess water can be treated prior to discharge," referring to the addition of water from outside the mine to use in the industrial process. If this is a definition, it is not found in the regulations, rather in the brief.

The fact that the regulations do not define recycling may well make them void for vagueness under our decision in *duPont*, at p. 1033, where we set aside an EPA regulation because we were "not sure what it means in the context in which it is used." That reasoning might well apply here even if this were the only objection, but there is a more basic fundamental objection to the recycling requirement.

We take it from all the record in this case that in the usual wet operation for both crushed stone and construction sand and gravel that the water used in the industrial process, generally speaking, comes from within the mine or quarry, whether it be from a settling pond or from some other source.<sup>14</sup> Assuming

<sup>13</sup> Various terms are defined in the regulations. A glossary to the development document defines many more. Recycle is not among them.

<sup>14</sup> There is a dispute over whether or not the water for the industrial process in a typical wet operation comes from within the mine or quarry. The engineer's report offered by petitioners previously referred to states that it does. Petitioners in their second reply brief state that it does and offer to corroborate the fact. EPA in its second reply brief con-

only that fact, then, the petitioners claim, and EPA points to nothing in the record to refute the fact, that the recycling requirement results in not one bit less discharge of pollutants into the navigable streams than the technology which petitioners claim should be the best practicable, that is allowing settling and discharge without recycling. In its brief, EPA argues that this claim of petitioners is without merit because some water may be lost by evaporation and some may be carried off on the product. But it points to no technical data to support its argument. Without the

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tests the fact, although in its first brief its argument that total recycle means all process water coming from within the system may lend some support to petitioners' view, but this is qualified by mention of added water from without the quarry or mine. The development document does not address the question. It lists the sources of process water as quarries, wells, rivers, company-owned ponds, and settling ponds, with no attempt at stating the source for a typical or ordinary operation. EPA contends in its second reply brief that only about half the quarries it studied dewater their quarries at all. We are unable to determine from this record the facts to ascertain which position is correct, but even assuming the correctness of EPA's apparent position that many quarries do not obtain their process water from within the mine or quarry, we especially note that EPA does not deny that many quarries do. That being true, and nothing in the record suggests that it is not, the very difficult question for EPA arises as to whether or not EPA, in any event, may make a rational decision which would impose upon a substantial part of an industry a burdensome and costly requirement which, if needed at all, is only needed in another part of the same industry. We do not attempt to answer that question on this record, but the fact that it is a serious question and is suggested by the record is not refuted by any argument EPA makes in the case.

benefit of an engineering opinion on the point, it would seem to us that if water is used to wash the stone or the sand and the water comes from within the mine, whether from settling pond or otherwise, that the same amount of water is going to be carried out on the finished product regardless of whether it is pumped from the settling pond or from somewhere else. Also, if there is a given amount of water within the mine from whatever source, and evaporation takes place from exposed surface areas, including the industrial process, explanation is required to show why any more water would evaporate in a system utilizing recycling when compared with one which did not. We do not say that petitioners' position will turn out to be correct, but the record before us does not show it to be incorrect, and it is supported by logic. We decline to accept EPA's position absent record support.

On the record before us, it is not shown that the addition of the recycling requirement, although admittedly costly and burdensome, will result in any reduction in the discharge of pollutants into the navigable waters. Indeed, EPA as much as acknowledges that absent evaporation and the water carried out on the product petitioners' premise is correct. This state of facts, then, makes applicable our ruling in *duPont*, at p. 1034, concerning the no discharge provision for plants using the electrolytic process for making hydrogen peroxide. In that case, one plant using a process unique to the industry in this country had a negligible difference in the quality of influent

well water and effluent discharge. We noted that the discharges were environmentally insignificant, and importantly we then followed with the statement that "we cannot comprehend how a change from the present to the EPA technology, evaporation and landfill will be beneficial. . . . On reconsideration, [for additional reasons] EPA must give consideration to the total environmental impact."

That holding also applies here. If the requirement of settling plus recycling results in no more benefit to the environment than simply resettling without recycling, then the recycling requirement may not be the best practicable control technology currently available, but only a burdensome and expensive addition. If EPA's argument is valid, that evaporation and the water carried out on the product result in less pollutants being discharged into the waters, then EPA must at least explain how much less pollutants will be discharged and what the additional cost will be for discharging the lower amount of pollutants. None of these subjects are addressed in the record. See *Appalachian Power Co. v. Train*, 545 F2d 1351, 1364 (4th Cir. 1976).

Parenthetically, we note that, especially for the construction sand and gravel industry,<sup>15</sup> and, to a lesser extent for the crushed stone industry, the prob-

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<sup>15</sup> The construction sand and gravel industry was permitted to discharge, if effluent limitations were met, commingled waste water without recycling under the interim final regulations. The final regulations reversed this policy without notice.

lems we have just mentioned concerning recycling could have as easily been avoided as those in the TSS context if only EPA had provided a fair notice of what it was doing with the reasons therefor and made available in time to allow for intelligent comment all of the technical data upon which it acted.

We thus remand the recycling provisions to the Agency for further consideration.

#### *No Discharge Provisions*

(42 F.R. 35850-1, §§ 436.22(a)(2), 436.32(a)(2))

The zero discharge requirement for process generated waste water in the interim final regulations (41 F.R. 23558-9, §§ 436.22(a)(1), 436.32(a)(1)) was absolute for the crushed stone industry because those regulations did not contemplate the commingling of process generated waste water with other waste water. It was also absolute for plants in the construction sand and gravel industry which did not commingle process generated waste water with mine dewatering water but permitted discharge without recycling for construction sand and gravel facilities which did so commingle. 41 F.R. 23559, § 436.32(a)(3). In the final regulations, the no discharge requirement for process generated waste water is the same for both industries, that is to say, no discharge for facilities which do not recycle but not applicable to those which do. As we have previously pointed out, recycling was not mentioned in the interim final regulations. The condition for both indus-

tries in the final regulations permitting discharge is recycling, which we have set aside. The condition being set aside, the no discharge provisions should be remanded for reconsideration by the Agency. We do not think the no discharge provisions are meant to stand alone. They were made a part of the final regulations in what EPA contends was an amelioration of the stringency of the interim final regulations in response to industry comments. They can hardly be considered an amelioration if they stand in their original form. Also, on remand, should EPA's position on the recycling requirement turn out to be not well taken, then it may well decide to omit the recycling requirement which might permit the discharge after settling of commingled process generated waste water and mine water provided numbered effluent limitations are met.

The no discharge provisions are therefore remanded to the Agency for reconsideration.

#### *Variance Provisions*

Petitioners also raise the question of whether the crushed stone (42 F.R. 35849, § 436.22) and construction sand and gravel (42 F.R. 35850, § 436.32) variance provisions comport with the decision of this court in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), in which case we set aside a variance clause for steam electric power point sources worded substantially the same as the variance provision now under review. Here, as in *Appalachian Power*, the EPA proposes to grant a



variance from the 1977 BPT standards only where "factors relating to the equipment or facilities involved, the process applied, or other such factors relating to such discharges are fundamentally different from the factors considered in the establishment of the guidelines." Compare 40 C.F.R. § 423.12(a) (1977) with 42 F.R. 35850, §§ 436.22, 436.32, which show the variance provisions in *Appalachian Power* and the ones before us to be in the same words.

We held in *Appalachian Power* that the variance clause was "unduly restrictive," 545 F.2d at 1359, and ordered a remand to the Agency for the development of "a meaningful variance clause" that would permit economic and other factors to be considered. *Id.* at 1359-60. The EPA, however, argues that *Appalachian Power* is not applicable here because review of the variance provision would be premature prior to any actual claim for a variance in a discharge permit application. See *E. I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd* on this ground, 430 U.S. 112, 128, n. 19 (1977). In *Appalachian Power*, however, we distinguished our decision in *duPont*, that review of the variance provision would be premature and speculative, because EPA had indicated its refusal in two administrative opinions to consider economic factors in considering variance requests. 545 F.2d at 1357-60, n. 22; 39 F.R. 28926-7, dated August 2, 1974, and 39 F.R. 30073 dated August 13, 1974.

We are of opinion the same distinction applies here, but with added background. On March 3, 1978,

the EPA announced its proposed amendments to the steam electric power variance provision we set aside in *Appalachian Power*. 43 F.R. 8812, 8813. Referring to our decision in *Appalachian Power*, the EPA announced this change: "In accordance with the Court's opinion, the [new] variance clause would allow the permit issuers to consider 'significant cost differentials' and other economic factors applicable to the particular source involved." 43 F.R. 8813. But the EPA further stated "[t]his change applies only to steam electric power plants. . . . For categories other than steam electric power plants, economic factors will not be considered in ruling on BPT variance requests. . . ." The final steam electric variance amendment appears at 43 F.R. at 43023 et seq., and 44846 (corrected), dated September 22 and 29, 1978, where the same position was taken.

In the meantime, however, despite EPA's continued assertions that "economic factors" should be "[exclude[d)]" in all categories of industry regulated by EPA other than steam electric power generation, the administrator, on ruling on a variance in the case of *In re Louisiana-Pacific Corp., et al.*, 10 E.R.C. 1841 (Sept. 15, 1977), had recited that the cost of application of the required technology was a major relevant fact. Despite this recitation, however, EPA did not change its stated position until after this case was submitted; and the final regulations effecting a change in position are not yet in effect.

On October 17, 1978, the general counsel for EPA withdrew the interpretations of August 1974 upon

which we had relied in *Appalachian Power* in holding that the construction of the variance clause was ripe for review and not premature. 43 F.R. 50042. That withdrawal had been preceded by only a few weeks by the promulgation, on August 21, 1978, of proposed variance provisions which would have made a significant departure from EPA's previous position and put the Agency more in line with our opinion in *Appalachian Power*. 43 F.R. 37132. The proposed provisions apparently would apply both to the crushed stone and construction sand and gravel industries, and together with the revocation by EPA of the August 1974 interpretations the matter might be moot were it not for one additional fact. In the paper published in 43 F.R. 50042 withdrawing the August 1974 interpretations, the administrator specifically noted that "EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific economic capability or 'affordability') applies only to best available technology (BAT) limitations."

That construction places EPA squarely in conflict with the rule in *Appalachian Power* which we have referred to. That case, on page 1359-1366, specifically required EPA to take into consideration, among other things, the statutory factors set out in § 301(c). EPA is well aware of our position, for, in *Appalachian Power*, in an order filed September 26, 1977, following the Supreme Court decision in *duPont*, the same point was made in a motion to us to amend our opinion. The request was denied.

In passing, we should note several arguments of EPA which are not well taken. First, EPA argues that our ruling demands variance requests be based on water quality standards rather than effluent limitations. We rejected that point of view in *Appalachian Power Company* at page 1378. Second, the administrative action of EPA of October 17, 1978, 43 F.R. 50042, strongly implies that our requirement that § 301(c) factors be at least considered in determining whether or not to grant a variance means that a plant may "secure a BPT variance by alleging [and proving] that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation." Like the previous EPA argument, this argument was also specifically rejected by us in *Appalachian Power*, where we said, with reference to the § 301(c) factors, that "if it is doing all that the maximum use of technology within its economic capability will permit *and* if such use will result in reasonable further progress toward the elimination of the discharge of pollutants . . . no reason appears why Consolidated Edison should not be able to secure such a variance should it comply with any other requirements of the variance." (Emphasis in original)

EPA's arguments as to water quality standards and as to its interpretation of the consideration of costs under § 301(c) are no better than straw men. Both positions have been previously considered by this court and rejected. They are not even argued by petitioners whose argument here largely is devoted to

other specific factors they claim should be considered in determining whether or not to grant a variance.

Finally, we should say that our construction of the variance provisions seems to be generally, if not precisely, in accord with that of the court in *Weyerhaeuser Co. v. Costle*, Nos. 76-1674, et al., 11 E.R.C. 2149 (D.C. Cir. 1978). That court analogized the 1983 variance provisions with the 1977 provisions, drawing upon the Supreme Court opinion in *duPont* as its authority. In summary, *Weyerhaeuser* held that a 1977 variance clause must be analogous to the 1983 variance clause, and that EPA's application of the 1977 variance clause must bear a similar relationship to the 1977 standards as the 1983 variance clause bears to 1983 standards. We have held, in *Appalachian Power Co.*, that EPA, in promulgating regulations under the 1977 variance clause, may not exclude the factors to be considered in granting variances under the 1983 standards because the statute contemplates there may be more stringent standards for 1983. While the 1983 standards are not before us for review, we note in the development document that the contractor recommends both pH and TSS limits for 1983 be the same as for 1977. Especially in a case where the effluent limits are the same, but in any case, we think the statute is not meant to stop the operation of a plant in 1979 under 1977 standards under more strict conditions than would apply to a plant operating in 1983 under standards for that year. This situation could easily close a plant in 1979 which would be allowed to operate under a variance in 1983.

Accordingly, we remand the variance provisions to the Agency for compliance with *Appalachian Power Company*.

#### *Definition of Process Generated Waste Water*

Finally, we consider the petitioner's contention that the definitions of process generated waste water in the final regulations (42 F.R. 35849-50, §§ 436.21(e), 436.31(e)) are so different from the definitions in the interim final regulations (41 F.R. 23558-9, §§ 436.21(e), 436.31(e)) that they must be set aside.

The addition in the final regulations about which complaint is made is that process generated waste water "shall also include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water."

Petitioners view the change as having significantly expanded the definition of process generated waste water, and indeed it has. But we doubt the definition is invalid on its face, for when we take into account the practical consideration that the commingling is done in a settling pond or even in another part of a mine or quarry, and that one, if not the, principal controversy before us seems to be whether effluent discharge of commingled waters meeting numbered effluent limitations is permissible without recycling, then we think the regulation could have a place in the scheme of regulation. This does not take into account, of course, lack of notice. Neither does it take into account the fact that the definition of proc-

ess generated waste water is completely intertwined with the controversy concerning effluent discharge and the recycling provisions.

Because of this, we think the proper course to take with respect to these regulations is to decline to act on them at this time in view of our remand of certain other regulations in this decision. On remand, petitioners should be allowed to comment on the regulations, and if they appear before us again, we will have them in the context of their accompanying regulations and will be in a better position to express an opinion on their validity, both for that reason and because accompanied by comment.

We, therefore, decline to express an opinion upon the validity of the expanded definition of process generated waste water at this time without prejudice to the matter being raised in a subsequent petition following the remand of this case to EPA and its reconsideration of the other regulations we have discussed in this case.

#### *Other Matters Raised in Briefs*

The petitioners also have asked us to set aside the regulations for industries which did not have the required technology in place by July 1, 1977 on the ground that the July 1, 1977 deadline for compliance with them had passed before the regulations were promulgated on July 12, 1977, to be effective August 11, 1977.

It is apparent that the petitioners' position raises what may be serious questions of statutory construc-

tion as well as constitutional limitations, and because we have remanded the contested regulations on other grounds, we do not express an opinion on those questions.

The fact that we may not have mentioned many of the points raised in the briefs should not infer any opinion of ours as to their merit.

#### *Conclusion*

The following regulations are remanded to the Agency for reconsideration:

#### *Crushed Stone Subcategories*

##### *Section*

§ 436.22 (variance clause)

§ 436.22(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.22(a)(2) (no discharge provision)

§ 436.22(a)(3) (TSS limits for mine dewatering discharge)

#### *Construction Sand and Gravel Subcategories*

§ 436.32 (variance clause)

§ 436.32(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.32(a)(2) (no discharge provision)

§ 436.32(a)(3) (TSS limits for mine dewatering discharge)



## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

76-1914

[Filed Jun. 18, 1979]

NATIONAL CRUSHED STONE ASSOCIATION, INC.,  
and LUCK QUARRIES, INC., PETITIONERS

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

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THIS CAUSE came on to be heard upon the petition of National Crushed Stone Association, Inc., and Luck Quarries, Inc., for review of an order issued by the Environmental Protection Agency entitled "Effluent Guidelines and Standards for Mineral Mining and Processing Point Source Category," 41 Fed. Reg. 23552-23560 (June 10, 1979), Subparts B, §§ 436.20, 436.21 and 436.22; upon the certified index to the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the following regulations are remanded to the Agency for reconsideration consistent with the opinion of this Court filed herewith:

*Crushed Stone Subcategories**Section*

§ 436.22 (variance clause)

§ 436.22(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.22(a)(2) (no discharge provision)

§ 436.22(a)(3) (TSS limits for mine dewatering discharge)

*Construction Sand and Gravel Subcategories*

§ 436.32 (variance clause)

§ 436.32(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.32(a)(2) (no discharge provision)

§ 436.32(a)(3) (TSS limits for mine dewatering discharge)

WILLIAM K. SLATE, II  
Clerk

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APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 76-1690

CONSOLIDATION COAL COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1859

BETHLEHEM STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1862

NATIONAL COAL ASSOCIATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT  
WEST VIRGINIA CITIZEN ACTION GROUP, INTERVENOR

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No. 76-1912

PEABODY COAL COMPANY, a corporation, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-1981

GIBRALTER COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1982

AMAX, INC., on behalf of its Amax Coal  
Company Division, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2019

THE DRUMMOND COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2020

SAVE OUR CUMBERLAND MOUNTAINS, INC.  
and CITIZENS LEAGUE TO PROTECT THE  
SURFACE RIGHTS, INC., PETITIONERS

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2059

NORTH AMERICAN COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2145

NATIONAL STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-2146

REPUBLIC STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-2147

UNITED STATES STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 77-1474

NATIONAL COAL ASSOCIATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1490

CONSOLIDATION COAL COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1491

BETHLEHEM STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1534

THE DRUMMOND COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1592

NATIONAL STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1593

REPUBLIC STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1594

UNITED STATES STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1828

PEABODY COAL COMPANY, a corporation, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 77-1845

WEST VIRGINIA-CITIZEN ACTION GROUP, INC.,  
MOUNTAIN COMMUNITY UNION, INC., and  
SAVE OUR MOUNTAINS, INC., PETITIONERS

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1892

SAVE OUR CUMBERLAND MOUNTAINS, INC.,  
and CITIZENS LEAGUE TO PROTECT THE  
SURFACE RIGHTS, INC., PETITIONERS

*versus*

DOUGLAS M. COSTLE, Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1893

NORTH AMERICAN COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1957

CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL  
COMPANY, CENTRAL COAL COMPANY, CENTRAL  
OHIO COAL COMPANY, SOUTHERN APPALACHIAN  
COAL COMPANY, SOUTHERN OHIO COAL COMPANY,  
and, WINDSOR POWER HOUSE COAL COMPANY, PE-  
TITIONERS

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 77-1989

AMAX INC., on behalf of its Amax Coal  
Company Division, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1990

GIBRALTAR COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-2088

COMMONWEALTH OF PENNSYLVANIA, Department  
of Environmental Resources, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

Argued October 5, 1978

Decided June 25, 1979

Before BUTZNER, WIDENER and HALL, Circuit Judges

BUTZNER, Circuit Judge:

In 27 consolidated cases, 17 coal producers, their trade association, 5 citizens' environmental associations, and the Commonwealth of Pennsylvania seek review, pursuant to 33 U.S.C. § 1369(b)(1)(E), of water pollution control regulations for existing facilities in the coal industry promulgated by the administrator of the Environmental Protection Agency.<sup>1</sup> We uphold the regulations with the exception of a clause establishing criteria for variances.

<sup>1</sup> See *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977), for a discussion of the jurisdiction of courts of appeals to review these regulations.

I

The Federal Water Pollution Control Act of 1972 is a legislative mandate to restore and maintain the chemical, physical, and biological integrity of the nation's waters.<sup>2</sup> The Act sets a national goal to eliminate the discharge of pollutants into the navigable waters by 1985.<sup>3</sup>

As the first step toward the 1985 goal,<sup>4</sup> Congress provided in § 301(b)(1)(A) of the Act<sup>5</sup> that

there shall be achieved . . . not later than July 1, 1977, effluent limitations for point sources [of water pollution], other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator [of the Environmental Protection Agency] pursuant to § 304(b) . . . .

This provision for effluent limitations marked a major change from prior law. Before the 1972 Act, water pollution control had been based upon water quality standards specifying the acceptable levels of pollution in the navigable waters. The program proved ineffective in part because the standards focused on the tolerable effects rather than the preventable causes of water pollution. Effluent limita-

<sup>2</sup> 33 U.S.C. §§ 1251-1376.

<sup>3</sup> 33 U.S.C. § 1251(a).

<sup>4</sup> The Act contemplates a two-phase reduction in pollutant discharges. Second-phase standards (§ 301(b)(2) [33 U.S.C. § 1311(b)(2)]) are not in issue here.

<sup>5</sup> 33 U.S.C. § 1311(b)(1)(A).

tions eliminate this problem because they directly restrict the concentrations of pollutants that may be discharged by any plant in a given industrial subcategory."

Section 304(b)(1)<sup>7</sup> requires the Administrator to publish regulations which must

identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . and specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes.

The administrator promulgated final water pollution control regulations for existing plants in the coal industry on April 26, 1977.<sup>8</sup> The regulations divide the industry into two categories—(1) coal mines and (2) coal preparation plants and associated areas. These categories are each subdivided according to acidic and alkaline discharges. For each of the resulting subcategories, the regulations establish maxi-

<sup>6</sup> *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202-05 (1976).

<sup>7</sup> 33 U.S.C. § 1314(b)(1).

<sup>8</sup> 42 Fed. Reg. 21380-21390 (April 26, 1977), adding certain parts of 40 C.F.R. Part 434. Regulations governing "new source" coal production facilities were promulgated separately and are not before us in these cases. *See* 44 Fed. Reg. 2586-2592 (Jan. 12, 1979).

mum concentrations of iron and total suspended solids. They also limit the permissible range of acidity and alkalinity of discharge water, and they restrict manganese concentrations in acidic drainage. None of the petitions before us challenges these maxima.<sup>9</sup> The petitions question the validity of seven aspects of the regulations which we will discuss in parts II-VIII of this opinion.

Our review is governed by § 10(e)(2) of the Administrative Procedure Act.<sup>10</sup> We must set aside any portion of the 1977 effluent limitations that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" is in excess of statutory authority; or is "without observance of procedure required by law."<sup>11</sup> The ultimate standard of review is narrow. This court is not empowered to substitute its judgment for that of the agency.<sup>12</sup> The Federal Water Pollution Control Act is to be given the broadest possible reading consistent with the commerce

<sup>9</sup> The administrator's brief states that this is the first case brought to review best practicable control technology standards in which the numerical national limitations have not been attacked.

<sup>10</sup> 5 U.S.C. § 706(2). *See* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978); *see generally* D. Currie, *Judicial Review under Federal Pollution Laws*, 62 Iowa L. Rev. 1221 (1977).

<sup>11</sup> 5 U.S.C. § 706(2); *see* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-17 (1971).

<sup>12</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416.

clause,<sup>13</sup> and ambiguities as to the administrator's powers under the Act are to be resolved in his favor.<sup>14</sup> Congress has required the agency to act quickly and decisively despite a recognized absence of exact data on pollution control technology, and we must hesitate to draw substantive conclusions differing from those of the agency in this area of imprecise knowledge. An overly expansive exercise of the judicial review power can impede accomplishment of the Act's goal of eliminating water pollution and thwart its requirement of national uniformity in effluent reduction technology.

## II. Variance—Statutory Factors

The industrial petitioners challenge the "fundamentally different factors" variance clause contained in the regulations<sup>16</sup> complaining that this provision

<sup>13</sup> *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755-55 (9th Cir. 1978); *Minnesota v. Hoffman*, 543 F.2d 1198, 1200 n.1 (8th Cir. 1976).

<sup>14</sup> *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977); *Inland Steel Co. v. EPA*, 574 F.2d 367, 373 (7th Cir. 1978).

<sup>15</sup> *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1025.

<sup>16</sup> The variance clause, contained in 40 C.F.R. §§ 434.22, 434.32, and 434.42 (1977) provides:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels estab-

fails to require the permit issuer to consider the factors set forth in §§ 304(b)(1)(B)<sup>17</sup> and 301(c)<sup>18</sup> of the Act.

lished. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence . . . that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. . . . If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations . . . either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors.

<sup>17</sup> 33 U.S.C. § 1314(b)(1)(B). This section provides in pertinent part that

factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

<sup>18</sup> 33 U.S.C. § 1311(c). This section provides that the Administrator may modify the 1984 second-stage pollution control requirements

upon a showing by the owner or operator of [a] point source that such modified requirements (1) will repre-

An identical variance clause was before the court in *National Crushed Stone Association v. EPA*,<sup>19</sup> which controls our disposition of this issue. *National Crushed Stone* holds that the clause is unduly restrictive, relying on *Appalachian Power Co. v. EPA*.<sup>20</sup> Accordingly, we set aside the variance clauses contained in 40 C.F.R. §§ 434.22, 434.32, and 434.42 and remand them for revision to conform with *National Crushed Stone*.

### III. Variance—Environmental Benefits

The industrial petitioners also insist that the regulations dealing with variances must be disapproved because they fail to require the agency to consider the environmental benefits of applying the effluent limitations to a particular source of pollution. The only specific error they attribute to the regulations is the absence of a provision requiring the agency to take into account the quality of the receiving water when it decides whether to grant a variance.

At the outset, we reject the agency's argument that consideration of this aspect of the variance regulations would be premature. In a recent adjudicatory proceeding, the administrator unequivocally ruled that the Act and, consequently, the regulations, do not

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sent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

<sup>19</sup> — F.2d —, No. 76-1914 (4th Cir., June 18, 1979).

<sup>20</sup> 545 F.2d 1351 (4th Cir. 1976).

authorize him to grant a variance to an industrial discharger by providing "relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters . . . ." <sup>21</sup> Since the administrator's interpretation of the regulations precludes any speculation about its meaning, review is not premature.<sup>22</sup> We therefore turn to the merits of the petition.

The pertinent regulations authorize the administrator to allow deviations from the national effluent limitations if factors peculiar to a specific source of pollution are fundamentally different from the factors considered in the establishment of the guidelines.<sup>23</sup> The precise issue, therefore, is whether the factors peculiar to a source of pollution must include comparison of the expected improvements in the receiving water with the cost of achieving them. We dealt with this issue in *Appalachian Power*,<sup>24</sup> where, in response to Consolidated Edison's request to be relieved of the effluent guidelines, we said:

[S]o far as its petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the statute changed the system from that of control of the quality of the

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<sup>21</sup> *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1854.

<sup>22</sup> *See Appalachian Power*, 545 F.2d at 1359.

<sup>23</sup> *See* n.16, *supra*.

<sup>24</sup> 545 F.2d at 1378.



body of water to effluent limitations as we have before noted.

The Court of Appeals for the District of Columbia Circuit also examined this issue in *Weyerhaeuser Co. v. Costle*,<sup>25</sup> and affirmed the administrator's refusal to consider receiving water quality in setting limitations.

These decisions recognize that after many years of experimenting with pollution control laws, Congress determined that emphasis on receiving water quality instead of effluent reduction technology was unacceptable for control of private sources of pollution. With exceptions not germane to this opinion, Congress has now mandated that even if the application of the best practicable control technology to a specific source of pollution results in no significant improvement in the quality of the receiving water, that technology must still be applied. Commenting on the change in the scheme for elimination of pollution, the Supreme Court said:

[A] discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.<sup>26</sup>

Any possible doubt about congressional intent to preclude consideration of receiving water quality in

<sup>25</sup> 590 F.2d 1011, 1041-44 (D.C. Cir. 1978).

<sup>26</sup> *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. at 204-05.

industrial variance rulings was put to rest in 1977. While considering legislation necessary for mid-course corrections in the federal water pollution control program, Congress heard evidence about the asserted inequity of technology-based standards.<sup>27</sup> In the resulting amendments,<sup>28</sup> Congress permitted consideration of receiving water quality as a basis for less stringent discharge standards in one situation: discharges from publicly owned treatment works into marine waters.<sup>29</sup> The intent to restrict this exception to municipalities is clear from the amendments and their legislative history.<sup>30</sup>

We therefore conclude that the variance regulations as interpreted by the administrator properly exclude consideration of the quality of the receiving water.

<sup>27</sup> See, e.g., Federal Water Pollution Control Act Amendments of 1977, Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Part 10 at 540-41 (1977).

<sup>28</sup> Act of Dec. 27, 1977 Pub. L. 95-217, 91 Stat. 1567, amending 33 U.S.C. (Clean Water Act of 1977).

<sup>29</sup> See 33 U.S.C. § 1311 (h).

<sup>30</sup> See 33 U.S.C. § 1311 (h); S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 45, 1977 U.S. Code Cong. & Admin. News 4370. The only provision for less stringent discharge standards based upon receiving water quality in the 1972 Act pertained to thermal discharges which are not in issue here. See 33 U.S.C. § 1326 (a); *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1848-50. In all other respects, the 1972 Act allowed consideration of receiving water quality only as a basis for standards that are more stringent than the technology-based effluent limitations. See, e.g., 33 U.S.C. §§ 1311 (b) (1) (C), 1312, 1313, 1316 (c).

We recognize, however, that elements of the environment apart from receiving water may be affected by enforcement of the effluent limitations, and in an appropriate case, these elements might warrant a variance.<sup>31</sup>

#### IV. Deadline

The industrial petitioners next argue that because the standards for the coal industry were promulgated barely two months before the statutory deadline for application of the best practicable control technology, they are in part unachievable, and therefore invalid, as to certain facilities. The petitioners suggest that the July 1, 1977, deadline for compliance with effluent limitations<sup>32</sup> may not be enforced because the administrator did not promulgate final regulations until long after the Act required him to do so.<sup>33</sup>

Congress addressed this problem when it passed the 1977 amendments to the Act. Section 309(a) (5) (B),<sup>34</sup> added by those amendments, authorizes the

<sup>31</sup> In *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1853 n.30, the administrator observed: "There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance." See 33 U.S.C. § 1314(b) (1) (B).

<sup>32</sup> See § 301(b) (1) (A) [33 U.S.C. § 1311(b) (1) (A)].

<sup>33</sup> See § 304(b) [33 U.S.C. § 1314(b)]; but see *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 705-06 (D.C. Cir. 1975).

<sup>34</sup> 33 U.S.C. § 1319(a) (5) (B). As explained in the Senate committee report:

[t]he extension would be available only when the Administrator determines that the discharger acted in good

administrator to extend the deadline up to April 1, 1979, for companies that, despite good faith efforts to comply with the best practicable control technology standards, were unable to do so by July 1977. This new provision speaks in general terms of persons who have violated the Act or who otherwise have not complied with its requirements. It does not specifically mention compliance problems caused by the administrator's delay in promulgating effluent limitations guidelines. Nevertheless, the legislative history establishes that the amendment is intended to afford relief in such situations to companies that satisfy its requirements.<sup>35</sup>

Industry also contends that an extension pursuant to § 309(a) (5) (B) will not prevent suits by private citizens pursuant to § 505 of the Act<sup>36</sup> against com-

faith; that a serious commitment to achieve compliance had been made by the discharger; that compliance would occur no later than January 1, 1979; that the extension would not result in other sources having to achieve additional controls; that the application for a permit was filed prior to December 31, 1974; and that the necessary facilities for abatement are under construction.

S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 61, 1977 U.S. Code Cong. & Admin. News 4386.

<sup>35</sup> See 123 Cong. Rec. S19650 (daily ed., Dec. 15, 1977) (remarks of Sen. Muskie, the chairman of the drafting subcommittee); S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 61-62, 1977 U.S. Code Cong. & Admin. News 4385-4387; *Monongahela Power Co. v. EPA*, — F.2d —, 12 E.R.C. 1440 (4th Cir., Nov. 8, 1978); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); cf. *State Water Control Board v. Train*, 559 F.2d 921, 927-28 (4th Cir. 1977).

<sup>36</sup> 33 U.S.C. § 1365.

panies that are unable to meet the statutory deadline. The courts, however, retain equitable discretion to determine whether and to what extent sanctions should be allowed against coal operators who qualify for relief under the amendment.<sup>37</sup>

Congress has adequately dealt with any dilemma that may confront a coal operator due to the agency's delay. Accordingly, the regulations are not invalidated by the short lead time.

### V. Western Coal Mines

The industrial petitioners next challenge the administrator's decision to exclude mines in six western states from the coverage of the maximum total suspended solids level applicable to mine drainage. Concerned that the administrator will promulgate more stringent standards for the western mines, the petitioners emphasize two assignments of error. First, they assert that the postponement of suspended solids limitations for the western mines violates the Act's requirement of uniformity in effluent limitations. Second, they point out that the limits for suspended solids, as proposed in 1976, applied to all mines in the country. They assert that they were not given adequate notice or opportunity to comment on the Agency's exclusion of these six states in its final regulations, in violation of the Administrative Procedure

<sup>37</sup> *State Water Control Board v. Train*, 559 F.2d 921, 927-28 (4th Cir. 1977); *accord*, *Weyerhaeuser Co. v. Costle*, 11 E.R.C. at 2185 n.86.

Act<sup>38</sup> and sections 101(e) and 304 of the Federal Water Pollution Control Act.<sup>39</sup>

The agency's interim effluent limitations guidelines, published October 17, 1975,<sup>40</sup> and May 13, 1976,<sup>41</sup> dealt with total suspended solids on a national, rather than regional, basis. The interim guidelines prescribed a maximum limitation for any one day of 70 milligrams of total suspended solids per liter of water (mg/l) and a maximum average daily value for 30 consecutive days of 35 mg/l. The final regulations, promulgated April 26, 1977, retain these values, but provide that the national suspended solids limitations do not apply in Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. In these states, the agency ruled, total suspended solids limitations will be determined on a case-by-case basis.<sup>42</sup> In the preamble to its final regulations, published April 26, 1977,<sup>43</sup> the agency explained its reasons for excluding these western states as follows:

*Western Coal Mines.* The Effluent Guidelines Division of EPA has received a substantial body of information from EPA Region VIII (located

<sup>38</sup> 5 U.S.C. § 553.

<sup>39</sup> 33 U.S.C. §§ 1251(e), 1314.

<sup>40</sup> 40 Fed. Reg. 48830.

<sup>41</sup> 41 Fed. Reg. 19832.

<sup>42</sup> 40 C.F.R. §§ 434.32(a) and 434.42(a) (footnote 1 to effluent limitations table).

<sup>43</sup> 42 Fed. Reg. 21382-21383.

in Denver, Colorado) with respect to the limitations on discharges from coal mines in the Western United States. Representatives of that Region believe more stringent numbers are appropriate in light of actual experiences with those mines. These data appear to support effluent limitations guidelines for a number of parameters significantly more stringent than the limitations announced today. The reasons for the apparent ability of Western coal mines to discharge pollutants in less concentration than is the case of Eastern coal mines are many, and certainly include the relatively more even topography of Western coal mines, the emphasis on recycle of relatively scarce water supplies, and the relatively lower concentration of pollutants in the geologic formations being exploited. The Agency is undertaking a thorough evaluation of the information being supplied from permit-granting authorities in the Western United States. It is anticipated that consideration will be given to proposal of a separate subcategory with respect to all pollutant parameters for those coal mining operations located in the Western United States which have attributes such that they are able to meet more stringent effluent limitations.

The Agency has determined not to promulgate national TSS limitations for mines in some Western States. Until national limitations guidelines are published which address Western mines and TSS, NPDES permit writers shall calculate TSS restrictions utilizing the same discretion and with the same deference to statutory factors as they have in the past.

We find no violation of the Act. In the first place, we note that the administrator has not exempted these mines from applying the best practicable technology to reach prescribed effluent limitations. Doing so would have violated the Act.<sup>44</sup> In contrast to outright exemption, the Act authorizes the administrator to create appropriate subcategories and to consider a broad range of factors when establishing the standards for facilities within such subcategories.<sup>45</sup> Thus, the Act does not prohibit the administrator from creating a subcategory based on geographic location if geological, topographical, or other technical factors justify it.

The administrator, however, has not utilized the Act to create a formal subcategory for the western mines. The issue therefore is whether the administrator has authority to take an interim step toward creating a subcategory by declining to apply the total suspended solid effluent limitations to a designated region pending further study.

While the resolution of the question is not free from doubt, we believe the administrator is empowered to defer establishment of the suspended solids limitation for mines in the western states. The information that the administrator received during the rulemaking proceedings indicated that, with the same

<sup>44</sup> *Cf. American Iron & Steel Institute v. EPA*, 568 F.2d 284, 294-95, 306-08 (3d Cir. 1977).

<sup>45</sup> *See* § 304(b)(1) [33 U.S.C. § 1314(b)(1)]; *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. at 131 n.21; *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1053.



pollution control equipment, western mines could be operated with more stringent limitations on the discharge of suspended solids than the eastern mines. There is therefore no apparent technological justification for applying the limitations that were appropriate for the rest of the country.

At the same time, the agency had not received and studied sufficient data to create a separate subcategory with specific limitations. Consequently, the administrator applied to the western mines all national criteria except the single limitation for which he lacked sufficient data. He then temporarily authorized state and federal officials to set levels of suspended solid effluents on a case-by-case basis.<sup>46</sup> This practice will generally require the western mines to continue to conform to more strict suspended solids limitations than those for eastern mines during the administrator's study of the data.

Referring to an analogous issue concerning the same statute, Judge Leventhal cautioned courts to exercise restraint for reasons that are pertinent here:

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<sup>46</sup> Section 402(a) (1) of the Act [33 U.S.C. § 1342(a) (1)] gives the administrator the power to issue effluent limitations on a case-by-case basis "prior to the taking of necessary implementing actions relating to" requirements under §§ 301, 302, 307, 308, and 403 of the Act. Sections 402(b)-(c) [33 U.S.C. §§ 1342(b)-(c)] allow for issuance of permits on a case-by-case basis by state authorities, subject to veto by the administrator under § 402(d) (2) [33 U.S.C. § 1342(d) (2)]. A discharger is free to challenge the terms of a permit issued by the administrator, or the administrator's veto of a state-issued permit, in a court of appeals. 33 U.S.C. §§ 1369(b) (1) (D)-(F).

The courts cannot responsibly mandate flat guideline deadlines when the Administrator demonstrates that additional time is necessary to insure that the guidelines are rooted in an understanding of the relative merits of available control technologies. The delay required to give meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date.<sup>47</sup>

A regulatory agency frequently needs to address problems step by step. It should not always be required to answer every question simultaneously.<sup>48</sup> The administrator's deferral of limitations for suspended solids in the west pending further study was prudent and lawful.

The petitioners also point out that the limits on suspended solids, when initially promulgated in the notice of rulemaking, applied to all mines, and they protest that they were not given adequate opportunity to comment on the agency's exclusion of the western mines in its final regulations. They argue that this omission violated the notice and comment provisions of the Administrative Procedure Act<sup>49</sup> and the requirement of public participation found in the Federal Water Pollution Control Act.<sup>50</sup>

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<sup>47</sup> *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 712.

<sup>48</sup> See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 705-12.

<sup>49</sup> 5 U.S.C. § 553.

<sup>50</sup> §§ 101(e), 304 [33 U.S.C. § 1251(e), 1314].

A notice of proposed rulemaking “‘must be sufficient to fairly apprise interested parties of the issue involved . . .’ but it need not specify ‘every precise proposal which [the agency] may ultimately adopt as a rule.’”<sup>51</sup> Moreover, “[t]he requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.”<sup>52</sup>

Tested by these familiar principles, the administrator’s procedure fully complied with both statutes.<sup>53</sup> The Federal Water Pollution Control Act placed the industrial petitioners on notice that individual discharge permits might contain suspended solids standards that were more stringent than the national limitations.<sup>54</sup> The administrator’s 1975 notice of in-

<sup>51</sup> *Action for Children’s Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977).

<sup>52</sup> *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

<sup>53</sup> See notes 49 and 50, *supra*.

<sup>54</sup> Section 301(b) (1) (C) of the Act [33 U.S.C. § 1311(b) (1) (C)] requires the agency to enforce

any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 U.S.C. § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

Section 304(a) (4) [33 U.S.C. § 1314(a) (4)] makes suspended solids a mandatory element of pollution control standards.

terim rulemaking advised that effluent limitations would take account of total suspended solids; that the agency had considered geographic locations during its study of effluents; that the quality of raw water discharged from coal mining activities varies significantly; and that regional geology may be a determinant of the variations.<sup>55</sup> Therefore, it is apparent that the administrator’s deferral of a limitation for suspended solids for the western mines pending further study dealt with problems that were mentioned in the notice. Moreover, the final regulations did not require the western mines to cease the discharge of any pollutant other than those mentioned in the notice. In this respect the administrator’s action differs from procedures that were criticized in cases on which the petitioners rely.<sup>56</sup>

For all of these reasons, we conclude that the exclusion of the mines in the western states does not invalidate the suspended solids limitation.

## VI. Coal Preparation Plants

The industrial petitioners’ final complain concerns the regulations dealing with coal preparation plants and associated areas. They claim that these regulations are impermissibly vague; that they fail to distinguish between point sources and non-point sources;

<sup>55</sup> 40 Fed. Reg. 48831 (Oct. 17, 1975).

<sup>56</sup> See, e.g., *American Frozen Food Institute v. Train*, 539 F.2d 107, 135 (D.C. Cir. 1976); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 99 (1977).

and that they do not adequately notify mining companies which of their activities are covered.

The Act restricts the administrator's authority to the regulation of discharges from point sources.<sup>57</sup> Non-point sources are subject only to analysis, study, and publication of information.<sup>58</sup> The Act defines a point source as follows:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged.<sup>59</sup>

This definition excludes unchanneled and uncollected surface waters.<sup>60</sup>

The regulations under attack establish the concentration of specific pollutants "which may be discharged by a point source" <sup>61</sup> after application of best practicable control technology. They define a point source in conformity with the statute.<sup>62</sup> Their definitions of coal preparation plant and coal preparation plant associated areas are as follows:

<sup>57</sup> §§ 301(e), 304(b) [33 U.S.C. §§ 1311(e), 1314(b)]; *Appalachian Power*, 545 F.2d at 1373.

<sup>58</sup> See § 304(f) [33 U.S.C. § 1314(f)].

<sup>59</sup> § 502(14) [33 U.S.C. § 1362(14)].

<sup>60</sup> *Appalachian Power*, 545 F.2d at 1373.

<sup>61</sup> 40 C.F.R. §§ 434.22(a)-(b).

<sup>62</sup> 40 C.F.R. § 401.11(d) (general definition, incorporated in these regulations by § 401.10).

The term "coal preparation plant" means a facility where coal is crushed, screened, sized, cleaned, dried, or otherwise prepared and loaded for transit to a consuming facility.<sup>63</sup>

The term "coal preparation plant associated areas" means the coal preparation plant yards, immediate access roads, slurry ponds, drainage ponds, coal refuse piles, and coal storage piles and facilities.<sup>64</sup>

The subsection which the petitioners criticize as vague provides:

The provisions of this subpart are applicable to discharges from coal preparation plants and associated areas, including discharges which are pumped, siphoned or drained from coal storage, refuse storage and coal preparation plant ancillary areas related to the cleaning or beneficiation of coal of any rank including but not limited to bituminous, lignite and anthracite.<sup>65</sup>

The petitioners argue that this regulation could be interpreted to apply to surface runoff that does not fit within the statutory definition of a point source.

We do not share the petitioners' concern. The subsection about which the petitioners particularly complain, read in context with other pertinent parts of the regulations,<sup>66</sup> applies only to discharges from

<sup>63</sup> 40 C.F.R. § 434.11(e).

<sup>64</sup> 40 C.F.R. § 434.11(f).

<sup>65</sup> 40 C.F.R. § 434.20.

<sup>66</sup> See n.61, *supra*, and accompanying text.

point sources. Stripped to its bare bones, the petitioners' complaint is directed at the statutory definition of a point source, which the agency is powerless to change. How the agency will apply its regulations to actual situations presents issues which cannot be satisfactorily resolved in the absence of a full factual background.<sup>67</sup> They can only be determined through the permit-issuing process, including the administrative and judicial review that is available to the petitioners.

We find no defect in the regulations for coal preparation plants and associated areas.

## VII. Post-Mining Discharges

The Commonwealth of Pennsylvania and several citizens' environmental associations<sup>68</sup> petition for review of the administrator's exclusion of point source discharges from inactive surface mines during reclamation and revegetation and from underground mines after coal production ceases. These petitioners charge that the administrator's decision to exclude these aspects of the coal industry was arbitrary and capricious, and therefore illegal. They emphasize that the deadline imposed by Congress passed without the promulgation of any regulations for these

<sup>67</sup> See *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 159, 163-66 (1967).

<sup>68</sup> Save our Cumberland Mountains, Inc.; Citizens League to Protect the Surface Rights, Inc.; West Virginia Citizen Action Group, Inc.; Mountain Community Union, Inc.; and Save our Mountains, Inc.

discharges. Pennsylvania additionally complains that the absence, or even the postponement, of rules pertaining to post-mining discharges will hinder its regulation of inactive mines by encouraging the industry to concentrate its operations in states with lower environmental standards.

The administrator, supported on this occasion by the industrial petitioners, claims that he has insufficient data, particularly on costs in relation to benefits, to draft the necessary regulations. Pennsylvania and the environmental groups insist, however, that one of the agency's development documents,<sup>69</sup> the comments received by the agency during rulemaking,<sup>70</sup> and the laws and regulations of several states<sup>71</sup> disclose sufficient data for the promulgation of pertinent regulations.

The record amply supports the petitioners' claim that post-mining pollution abatement is an integral part of coal production. In two sections of the Act, Congress explicitly recognized the problem of pol-

<sup>69</sup> EPA, Development Document for Interim Final Effluent Limitations Guidelines and New Source Performance Standards for the Coal Mining Point Source Category (May 1976).

<sup>70</sup> See, e.g., 42 Fed. Reg. 21383 (April 26, 1977).

<sup>71</sup> See, e.g., Ky. Rev. Stat. Chapter 350 (1978 Cum. Supp.); 35 Penna. Stat. § 691.1 et seq. (1978 Supp.); Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977). Also, according to EPA, the State of West Virginia has consistently certified that mines must continue to meet effluent limitations after release of the reclamation bond.



luted drainage from abandoned mines.<sup>72</sup> Coal mining, whether on the surface or underground, necessitates massive excavations that change the drainage characteristics of the land. Drainage of precipitation and surface water over coal waste—rather than water actually used for coal mining—causes the bulk of the water pollution from coal mines.<sup>73</sup> Ceasing active mining operations does not necessarily reduce water pollution from the site. Pollution may continue indefinitely or even increase in intensity if proper mining methods and control technology are not employed.<sup>74</sup> Pollution from post-mining sites may come from point source discharges.<sup>75</sup>

Much of our discussion in Part V about the western coal mines is pertinent to this issue. The administrator cannot exempt post-mining point source discharges from the application of the best practicable control technology. Section 301(e) of the Act requires that pertinent effluent limitations must be applied to all point sources without exception.<sup>76</sup> The

<sup>72</sup> §§ 107 and 304(f)(2)(B) [33 U.S.C. §§ 1257 and 1314 (f)(2)(B)] Both sections, however, provide only for study, analysis, and demonstration projects.

<sup>73</sup> Unlike coal preparation plants and plants in certain manufacturing industries coal mining does not use water as part of the process, except in small quantities for dust control and fire prevention. Appendix B to final regulations, 42 Fed. Reg. 21387 April 26, 1977.)

<sup>74</sup> See 42 Fed. Reg. 21387 (April 26, 1977).

<sup>75</sup> See 42 Fed. Reg. 21383, 21387 (April 26, 1977).

<sup>76</sup> 33 U.S.C. § 1311(e); see *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 306-08 (3d Cir. 1977).

administrator may, however, subcategorize the coal industry for the purpose of prescribing effluent limitation guidelines under § 304(b)<sup>77</sup>

Here, the administrator has created a subcategory for active mines. He accomplished this by defining a coal mine as “an active mining area.”<sup>78</sup> This phrase was defined in turn as follows:

[A] place where work or other activity related to the extraction, removal, or recovery of coal is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.<sup>79</sup>

To eliminate any question about the exclusion of post-mining operations the regulations also provide:

Drainage which is not from an active mining area shall not be required to meet [these] limitations . . . as long as such drainage is not commingled with untreated mine drainage which is subject to the limitations . . .<sup>80</sup>

The administrator rightly decided that regulations for active mines might prove to be inappropriate for inactive mines. Indeed, Congress has demonstrated its belief that inactive mines require pollution controls that are quite different from those for active mines. By enacting the Surface Mining Control and

<sup>77</sup> See text and cases cited at n.45, *supra*.

<sup>78</sup> 40 C.F.R. § 434.11(d).

<sup>79</sup> 40 C.F.R. § 434.11(b).

<sup>80</sup> 40 C.F.R. §§ 434.32(c), 434.42(c).

Reclamation Act of 1977,<sup>81</sup> Congress recognized that the Federal Water Pollution Control Act is inadequate to eliminate pollution from inactive mines. The surface mining act addresses many of the issues raised by the environmental groups and Pennsylvania. It requires a surface mine operator to restore vegetation, prevent erosion, and curtail water pollution after active mining has ceased.<sup>82</sup> It also requires underground mine operators to take specified measures during and after mining to reduce water pollution.<sup>83</sup>

Since we have concluded that the administrator acted properly in treating active mines as a subcategory that excluded inactive mines, the remaining issue becomes quite narrow. It is whether, in view of the administrator's failure to meet the deadline for promulgating regulations dealing with post-mining discharges, we should remand the regulations for prompt inclusion of inactive mines. The administrative record establishes that techniques for reducing pollution from inactive mines are generally known in the industry and that they are successfully utilized by some mining companies. The record, however, does not disclose data concerning the "total cost of application of technology in relation to the effluent reduction benefits to be received from such applica-

<sup>81</sup> Act of August 3, 1977, Pub. L. 95-87, 91 Stat. 447, codified as 30 U.S.C. §§ 1201-1328.

<sup>82</sup> § 515 of the surface mining act [30 U.S.C. § 1265].

<sup>83</sup> § 516 of the surface mining act [30 U.S.C. § 1266].

tion." The agency must consider this information in assessing the best practicable control technology currently available.<sup>84</sup>

The passage of the Surface Mining Control and Reclamation Act of 1977 also must be taken into account in determining whether the administrator acted arbitrarily by deferring regulation of post-mining discharges. That statute does not supersede or modify the Federal Water Control Pollution Act;<sup>85</sup> therefore, the administrator remains responsible for promulgating regulations concerning effluent limitations for point source discharges from post-mining areas in accordance with §§ 301 and 304 of the water pollution control act.<sup>86</sup> But the surface mining act requires the Environmental Protection Agency to cooperate "[t]o the greatest extent practicable" with the Secretary of the Interior.<sup>87</sup> Conversely, the Secretary is also required to cooperate with the agency.<sup>88</sup> The purpose of this cooperation is "to minimize duplication of inspections, enforcement, and administration."<sup>89</sup> We therefore conclude that the administrator

<sup>84</sup> § 304(b)(1)(B) of the water pollution control act [33 U.S.C. § 1314(b)(1)(B)]; *see* FMC Corp. v. Train, 539 F.2d at 978-79.

<sup>85</sup> § 702(a)(3) of the surface mining act [30 U.S.C. § 1292(a)(3)]

<sup>86</sup> 33 U.S.C. §§ 1311, 1314.

<sup>87</sup> § 702(c) of the surface mining act [30 U.S.C. § 1292(c)].

<sup>88</sup> § 201(c)(12) of the surface mining act [30 U.S.C. § 1211(c)(12)]

<sup>89</sup> *Id.*

responsibly decided to gather further data before issuing the regulations that must be consistent with the Secretary's enforcement and administration of the surface mining act.<sup>90</sup>

A third factor bearing on the propriety of the administrator's exclusion of post-mining discharges is the extent to which this aspect of the industry is regulated without his direct intervention. Even in the absence of national standards, the administrator may issue permits on a case-by-case basis for post-mining discharges.<sup>91</sup> Moreover, since there are no national standards for post-mining point source discharges, effluent limitations certified by a state must be incorporated in a discharge permit.<sup>92</sup>

A suit to challenge the administrator's action on the basis of information not in the record, or for the imposition of a judicial deadline for the promulgation

<sup>90</sup> After the administrator issued the regulations applicable to active coal mines, the Secretary of the Interior promulgated interim final regulations to implement the surface mining act. See 30 C.F.R. Part 77 (1977). The administrator concurred in these regulations. 42 Fed. Reg. 62639 (Dec. 13, 1977). The regulations are presently under review. In re Surface Mining Regulation Litigation, — F.Supp. —, 11 E.R.C. 2078 (D.D.C., Aug. 24, 1978), *appeal docketed*, No. 78-2190 (D.C. Cir., Nov. 20, 1978); see also In re Surface Mining Regulation Litigation, 452 F.Supp. 327 (D.D.C. 1978), *aff'd mem.*, No. 78-1406 (D.C. Cir., May 25, 1978).

<sup>91</sup> § 402(a) (1) [33 U.S.C. § 1342(a) (1)].

<sup>92</sup> See §§ 301(b) (1) (C), 401 510 [33 U.S.C. §§ 1311(b) (1) (C), 1341, 1370]; United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977).

of post-mining regulations, would more appropriately be brought in a district court where matters not disclosed by the administrative record could be offered in evidence.<sup>93</sup> We hold only, on the record presented in these petitions for review, that the final regulations are not invalidated by the absence of provisions dealing with post-mining discharges.

### VIII. Catastrophic Rainfall Exemption

The citizen environmental petitioners and Pennsylvania challenge a provision, contained in §§ 434.22 (c), 434.32(b), and 434.42(b) of the regulations, which is intended to allow overflow of untreated water from pollution control facilities in extraordinary circumstances. At the time these cases were briefed and argued, the regulations provided as follows:

Any untreated overflow, increase in volume of a point source discharge, or discharge from a by-

<sup>93</sup> Section 505 [33 U.S.C. § 1365] allows any citizen, after giving the administrator sixty day's notice, to "commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The same provision gives the district courts original jurisdiction over such suits, without regard to the amount in controversy or the citizenship of the parties. See, e.g., Central Hudson Gas & Electric Corp. v. EPA, 587 F.2d 549, 555-57 (2d Cir. 1978); Environmental Defense Fund v. EPA, — F.2d —, 12 E.R.C. 1353, 1375-76 (D.C. Cir., Nov. 3, 1978); Natural Resources Defense Council, Inc., v. Train, 510 F.2d 692, 698-703 (D.C. Cir. 1975); cf. Currie, Judicial Review under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1249-50 (1977).

pass system from facilities designed, constructed, and maintained to contain or treat the discharges from the facilities and areas covered by this subpart which would result from a 10-year 24-hour precipitation event, shall not be subject to the limitations set forth in paragraph (a) of this section.

This means that after a storm or other natural event that forces an overflow from a facility designed, constructed, and maintained to contain a 10-year 24-hour precipitation event,<sup>94</sup> the overflow will be permitted.<sup>95</sup> The record discloses that this provision is similar in many respects to safety standards previously promulgated by the Department of the Interior for water impoundment facilities at existing coal mines.<sup>96</sup>

<sup>94</sup> "10-year 24-hour precipitation event" is an engineering term. It is a rainfall figure, taken from National Weather Service charts for the relevant geographic area, which indicates the heaviest 24-hour precipitation that can be expected to fall in a decade. 40 C.F.R. § 434.11(h) (1977). The possible use of this criterion as a basis for an overflow exemption was recognized during legislative debate on the Act. Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 1298 (1973).

<sup>95</sup> EPA summary of final regulations, 42 Fed. Reg. 21381 (April 26, 1977).

<sup>96</sup> See Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines, 30 C.F.R. 77.216 through 77.216-5 (1977) (promulgated by the Mine Enforcement and Safety Administration). The administrator took note of these regulations. 42 Fed. Reg. 21381-21382 (April 26, 1977).

The petitioners do not dispute the necessity for a catastrophic rainfall exemption, nor do they question a criterion of the heaviest 24-hour precipitation that can be expected to fall in a decade. Their principal complaint is that the administrator arbitrarily and capriciously based the exemption on the design, construction, and maintenance of the pollution control facilities rather than on the magnitude of actual precipitation. They prefer the regulation to specify that the exemption will apply only when the 10-year 24-hour rainfall actually occurs. They point out that in the catastrophic rainfall regulations applicable to other industries, the agency has used the criterion of actual performance, rather than design, construction, and maintenance.<sup>97</sup>

After oral argument of these cases, the administrator promulgated final regulations clarifying 40 C.F.R. §§ 434.22(c), 434.32(b), and 434.42(b). These provisions now expressly allow only discharges from properly designed and constructed facilities that "result[] from a 10 year/24 hour or larger precipitation event or from a snow melt of equivalent volume."<sup>98</sup>

We consider the law in effect at the time we render our decision. See *Thorpe v. Housing Authority of the*

<sup>97</sup> See, e.g., 40 C.F.R. §§ 415.22(b) (aluminum sulfate production) and 421.42(b) (primary copper smelting) (1977). These regulations allow an exemption for the 10-year 24-hour event only "when such event occurs."

<sup>98</sup> 40 C.F.R. §§ 434.25(b), 434.35(b), 434.45(b), promulgated in 44 Fed. Reg. 2590 (Jan. 12, 1979).



City of Durham, 393 U.S. 268, 281-83 (1969). EPA's change in the language of the exemption disposes of the criticism of Pennsylvania and the environmental petitioners.

The lack of provisions specifying the details of necessary design, construction, and maintenance does not invalidate the regulations. In all of the regulations under review, the administrator has avoided dictating engineering specifications. Instead, he has properly concentrated on prescribing limitations on the amount of pollutants that may be discharged regardless of the construction or treatment techniques that are employed. Using the 10-year 24-hour engineering standard without detailed specifications for impoundment facilities is consistent with this approach.<sup>99</sup>

The petitions to set aside the regulations are denied with the exception of the regulations dealing with variances, which are remanded to the agency for reconsideration.

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<sup>99</sup> Other regulatory agencies use this method of stating design storm criteria. These agencies include the Soil Conservation Service, the United States Bureau of Reclamation, the American Society of Civil Engineers, and the regulatory agencies of several states. See United States Department of the Interior, Mining Enforcement and Safety Administration, Engineering and Design Manual for Coal Refuse Disposal Facilities, page 6.57 n.1 and sources cited (1975).

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 76-1690

[Filed Jun. 25, 1979]

CONSOLIDATION COAL COMPANY, PETITIONER

*vs.*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

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THIS CAUSE came on to be heard upon the petition of Consolidation Coal Company for review of an order issued by Administrator of the Environmental Protection Agency on May 3, 1976; and upon the certified record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the petitions to set aside the regulations are denied with the exception of the regulations dealing with variances, which are remanded to the Environmental Protection

Agency for reconsideration consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II  
WILLIAM K. SLATE, II  
Clerk

# APPENDIX E

Section 301 of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, provides in pertinent part:

(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 U.S.C. 1314(b)] \* \* \*.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act [33 U.S.C. 1314 (b) (2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including infor-

mation developed pursuant to section 315 [33 U.S.C. 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 U.S.C. 1314(b)(2)] \* \* \*.

\* \* \* \* \*

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 U.S.C. 1317(a)] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 U.S.C. 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 U.S.C. 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations

in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Section 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1314(b), provides in pertinent part:

For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title [Oct. 18, 1972], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

\* \* \* \* \*

(1)(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to

the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act [33 U.S.C. 1311(b)(1)] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

\* \* \* \* \*

(2)(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act [33 U.S.C. 1311(b)(2)] to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

\* \* \* \* \*

(4)(B) specify factors to be taken into account in determining the best conventional pollutant con-

trol technology measures and practices to comply with section 301(b)(2)(E) of this Act [33 U.S.C. 1311(b)(2)(E)] to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

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MOTION TO DISPENSE WITH APPENDIX

---

Pursuant to Rule 36(8) of the Rules of this Court, the Solicitor General, on behalf of the federal petitioners, moves to dispense with the requirement of an appendix.

• On February 19, 1980, the Court granted the petition for a writ of certiorari in this case. The primary question raised

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---

MOTION TO DISPENSE WITH APPENDIX

---

Pursuant to Rule 36(8) of the Rules of this Court, the Solicitor General, on behalf of the federal petitioners, moves to dispense with the requirement of an appendix.

• On February 19, 1980, the Court granted the petition for a writ of certiorari in this case. The primary question raised is whether regulations adopted by the Administrator of the Environmental Protection Agency in accordance with Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311(b)(1), must include a variance provision that requires consideration of the economic ability of an individual discharger to afford the costs of the "best practicable control technology currently available." The case also presents a substantial ripeness question.

Various relevant documents are reprinted as appendices to the petition for a writ of certiorari (Pet. App. 1a-85a). After reviewing the record in this case, counsel for both petitioners and respondents have concluded that no other materials in the record will aid the Court in the resolution of the issues posed by this case. Accordingly, we request that the Court dispense with an appendix in this case. If the motion is granted, we will include "the relevant docket entries in the proceeding below" as an appendix to our brief on the merits. See Rule 36(1), Rules of the Supreme Court.

Respectfully submitted.

WADE H. McCREE, JR.  
Solicitor General

APRIL 1980